91-205

Supreme Court, U.S.
FILED
AUG 1 1991
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

STONEWALL UNION and CRAIG COVEY,

Petitioners,

v.

CITY OF COLUMBUS, LARRY H. JAMES and JAMES G. JACKSON

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a municipal ordinance violate the First and Fourteenth Amendments when it requires payment of substantial fees, in excess of actual governmental costs, for parade permits and costs of police assigned to parades on traditional public forums?

2. Does a municipal ordinance violate the First and Fourteenth Amendments when it grants unbridled official discretion to establish charges for parade permits and costs of police assigned to parades or when it grants no exception for poor speakers?

3. Are constitutional rights to freedom of speech and equal protection violated by the government's selective waiver or subsidy of parade permit fees and costs of police because officials have determined some parades to be reasonably related to a government function?

LIST OF PARTIES

The parties to the proceedings and in this court are the plaintiff-petitioners Stonewall Union and Stonewall Union Executive Director Craig Covey. The defendant-respondents are the City of Columbus, Larry H. James, Director of Public Safety, and James G. Jackson, Chief of Police.

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No. _____

IN THE

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October Term, 1991

STONEWALL UNION, *et al., Petitioners,*

v.

CITY OF COLUMBUS, *et al, Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners Stonewall Union and Craig Covey respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled proceedings on May 6, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, review of which is sought by this petition, is reported at 931 F.2d 1130. It is reprinted in the appendix hereto at p.6a. An unpublished prior opinion of the Sixth Circuit affirming a denial of a preliminary injunction has not been published and is reprinted in the appendix hereto at p.72a.

The memorandum opinion of the United States District Court for the Southern District of Ohio that granted defendant-respondents' motion for summary judgment which is the subject of this appeal is not reported. It is reprinted in the appendix hereto at p.25a There were two prior opinions of the district court related to the denial of plaintiffs' initial motion for a preliminary injunction. They are not reprinted in the appendix because they are not the subject of this appeal.

JURISDICTION

The petitioners filed this suit on May 16, 1985. On June 20, 1985, the district court denied petitioners' motion for a preliminary injunction and on June 25, 1985 denied petitioners' motion for an injunction pending appeal. The Court of Appeals for the Sixth Circuit affirmed the district court denial of the motion for a preliminary injunction on May 24, 1986. Justice O'Connor of this court denied petitioners' application for a stay on June 17, 1986.

On June 28, 1990, the district court granted the City of Columbus's motion for summary judgment and entered a final judgment in the case that disposed of all issues. Thereafter, on May 6, 1991, the Court of Appeals for the Sixth Circuit affirmed in part and reversed in part.

The jurisdiction of this Court to review the May 6, 1991 judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

THE CONSTITUTIONAL PROVISIONS AT ISSUE

Constitution of the United States, Amendment I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

> speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE ORDINANCE PROVISIONS AT ISSUE

All of the provisions of Ch. 2111 of the Municipal Code of Columbus are reproduced in the appendix hereto at p. 1a.

STATEMENT OF THE CASE

Petitioner Stonewall Union ("Stonewall") is a civil rights organization that advocates protection and support of the civil liberties of gay and lesbian persons. Since 1982, one of the most important ways in which it communicates its message to the general public is by holding an annual gay and lesbian civil rights parade on the fourth Sunday of each June in downtown Columbus, Ohio.[1] The one-hour parade is timed to coincide with

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1. The parade is preceded by a one hour assembly at a public park and it ends with a one hour assembly on the grounds of the state capitol. Permits for both assemblies are issued free-of-charge by appropriate government agencies.

similar gay and lesbian civil rights parades held simultaneously around the country. As a prerequisite for holding parades, the City of Columbus has required the Stonewall Union to prepay sums of $757.50 in 1985 and 1986 and $884.50 in 1987.[2] Eighty-five dollars is for a permit fee and the balance is to pay for city police assigned to traffic control. The charges imposed by the city required Stonewall to operate at a deficit in 1985 and 1986. (R.8: Tr.18-19; Cohen Aff., 6/26/87)

This case arose in March 1985 when Craig Covey, the Stonewall Union's executive director, sought a permit for the 1985 gay and lesbian civil rights parade. At that time, Plaintiff Covey submitted his parade permit application to the City of Columbus license section where he was informed that Ch. 2111 of the Columbus City Code requires all persons applying for a parade permit to pay, in advance, the $85 permit fee plus an hourly charge for police assigned to the parade.

Covey also learned that permit applications are not processed by the city's license section until first processed by appropriate police officials who set the charges for police services. (R.1: Verif. Cmplnt. p.5) At the time that he took the application to the license section, Covey was told that he would first have to take it to the police department. He did so, and police officials read his application, asked questions about the parade and entered information on the application form specifying the number and cost of extra-duty police officers that Stonewall would be required to pay for. Stonewall was

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2. In addition, the Petitioners' brief in the court of appeals informed the court that after the motions for summary judgement had been submitted to the district court, Petitioners were charged $85 for a permit and $814.50 for police services provided for their 1989 parade. For their 1990 parade, Plaintiffs were charged $85 for a permit and $1202 for police services.

required to tender a check to the police department to pay for extra-duty officers and squad cars only. After each of these steps were completed the permit application was processed by license section personnel. (R.8: Tr.13; R.26: Freeman Dep. 6-10)

The charges for the permit and for police services are based on two separate sets of computations. The hourly charge for extra-duty police is set by labor negotiations between the City of Columbus and the police union. (A.54a) It is based on a three hour minimum which must be paid by sponsors of all parades and exceeds the hourly wages paid to regular duty police officers. (Regular duty police officers paid regular wages are not assigned to parades.) (A.54a) The charge for police vehicles is based on commercial car leasing company rates for medium sized cars and therefore contains a margin of profit. (R.26: Brown Dep. 54-55) The $85 permit fee is based on a city study which determined that the permit fee should be comprised of the actual processing costs plus 30% to defray the overhead costs attributable to operating the entire city government. (R.26: Brown Dep. 20-34)

The charges are imposed on a take-it or leave-it basis. The only way to avoid the charges is to forego the parade entirely or to use public sidewalks.

Lieutenant Karl Barth, the officer responsible for setting the fee for police assigned to each parade, determines the charges on a case-by-case basis. According to the ordinance, he is to consider "such factors as time, date, route, length, number of participants and vehicles contained in the application of the parade permit." (Ch. 2111.04) He does not use a strict formula to determine how many police to assign. Among other things, he considers the number of viewers of the prospective parade, the intersections the parade will pass through, the number of participants, and the

number of vehicles in the parade. (R.3: Ex. E; R. 26: Barth Dep. 25, 2/25/87) Lieutenant Barth testified at his deposition that he cannot specify all of the variables that he considers when he reviews a parade permit application to determine police charges. He stated that in the back of his mind he knows that in any particular case there might be "a variable of some type" that he has to consider which is unique to a particular permit application. (R.26: Barth Dep. 26-29; 2/25/87)

At the preliminary injunction hearing, Police Chief Dwight Joseph testified that traffic on the parade route would be light to moderate. (R.8: Tr. 43) Stonewall member Sue Iarussi, a part-time suburban police officer, testified that the costs for police services could be reduced if the city would allow Stonewall personnel to assist Columbus police. (R.8: 25-31) The city declined.

During 1984 and 1985, the prepaid charge for police services supplied to a privately sponsored parade ran as high as $6400. The charge for the 1984 St. Patrick's Day Parade was $3160.60; the charge for the local 1984 AFL-CIO Labor Day Parade was $1,657.50. (R.4: Ex. C)

The City of Columbus makes exceptions to charges for permit fees and police services in spite of the fact that Ch. 2111 provides that its provisions "shall not be waiverable (sic) by Columbus City Council for any applicant desiring to conduct a parade, procession, or other moving assemblage upon the streets or roadways of the City of Columbus." (Ch. 2111.08) There are several ways in which the city makes exceptions. In some cases it redefines parades as processions not covered by the ordinance. (A.63a) In other cases it sponsors or co-sponsors parades without imposing charges for a permit or police services. (R.26: Rinehart Dep. 7-13) In yet other cases it subsidizes parades without sponsoring them. (R.26: Dodge Dep. 7-10)

For example, on March 20, 1985, during the early stages of the national savings and loan crisis, a procession of motor vehicles en route from Cincinnati moved over downtown streets to the Ohio Statehouse. The procession was held for the purpose of protesting the temporary closing of all Ohio savings and loan institutions after several had become insolvent. The city assigned 41 police officers, a police helicopter and a tow truck to the event. Of the total number of officers, 23 were assigned to specific intersections along the parade route. No permit was required and no charges for police services were imposed because the city maintained it was not a parade covered by the ordinance. (A.61a-63a)

On June 28, 1986, the City of Columbus authorized the Veterans of Foreign Wars to hold its annual parade without paying over $2000 for a permit and for police services. The charges were paid by the Greater Columbus Convention and Visitors Bureau, which is funded by Columbus city tax revenues collected as the Columbus hotel-motel tax. (Columbus City Code, Art. 11, Ch. 371-01 *et seq.*) The Convention Bureau pays for the VFW parade as well as other parades because it believes that the subsidy attracts conventions and "brings business to our city." (R.26: Dodge Dep. 7,10; R.28 Def. Memo Contra 15-16 8/21/87)

Similarly, a twenty-six mile marathon, known as the Columbus Marathon, is held each fall on the streets of Columbus. According to race director Mike Collins, "The Columbus Marathon is the largest single spectator sporting event in Ohio." (R.28: Collin Aff. para. 3) In 1984 and 1985, the Recreation and Parks Department of the City of Columbus was one of the sponsors of the marathon and paid for the parade permit and police costs incident to traffic control along the race route. In 1986, the parade and traffic control costs were paid by the

Greater Columbus Convention and Visitors Bureau. (R.28: Collin Aff. para. 5)

On June 16, 1986, petitioners wrote the mayor of Columbus and requested that Columbus co-sponsor the Stonewall parade and waive the permit fee and the charge for police services. (R.26: Supp. Dist. Ct. App. 70) The request was denied on June 27, 1986.

On May 6, 1991, the Court of Appeals for the Sixth Circuit held, in part, that Ch. 2111 of the Columbus Municipal Code was constitutional on its face. The court concluded that the charges authorized by Ch. 2111 are approved by *Cox* v. *New Hampshire*, 312 U.S. 569 (1941). In addition, the court of appeals reversed the portion of the district court judgment that upheld the exceptions to enforcement of Ch. 2111. The court of appeals based its partial reversal on the conclusion that there were material factual disputes over whether the exceptions to enforcement of Ch. 2111 constituted discriminatory enforcement. It remanded for a hearing on this issue and instructed the district court that exceptions to enforcement were permissible for parades that were "reasonably related to the government function which the sponsoring department of the City government performs...." (A.21a)

REASONS FOR GRANTING CERTIORARI

I. HEAVY USER FEES THAT ARE A PREREQUISITE FOR SPEECH ACTIVITIES ON TRADITIONAL PUBLIC FORUMS IMPOSE BURDENS ON SPEECH AND ASSEMBLY FORBIDDEN BY THE FIRST AMENDMENT.

The issue in this case is one of obvious national significance: Can localities assess substantial "user fees" for the exercise of First Amendment rights in traditional public forums?

The effort to charge for the exercise of First Amendment rights is not unique to Columbus, Ohio. Similar ordinances or regulations have been employed in: Orlando, Florida;[3] Dallas, Texas;[4] West Haven, Connecticut;[5] and Thurmont, Maryland.[6] They are being enforced in many other places, as well.[7]

The widespread imposition of heavy financial burdens has occurred notwithstanding this Court's consistent recognition, for more than fifty years, that the streets represent a traditional public forum for the exercise of First Amendment rights. As this court explained in *Hague* v. *CIO*, 307 U.S. 496, 515-516 (1939):

> Wherever the title of *streets* and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of *streets* and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. (emphasis added)

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3. *Central Florida Nuclear Freeze Campaign* v. *Walsh*, 774 F.2d 1515 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986).

4. *Fernandes* v. *Limmer*, 663 F.2d 619 (5th Cir. 1981), *rehearing denied*, 669 F.2d 729, *cert. dismissed*, 458 U.S. 1124 (1982).

5. *Invisible Empire Knights of the Ku Klux Klan* v. *City of West Haven*, 600 F. Supp. 1427 (D. Conn. 1985).

6. *Invisible Empire of the Knights of the Ku Klux Klan* v. *Mayor, Board of Commissioners, and Chief of Police of the Town of Thurmont, Maryland*, 700 F. Supp. 281 (D. Md. 1988).

7. For a list of such ordinances see Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 Geo. L.J. 257, 352-362 (1985). For an example of a state agency imposing a substantial pecuniary burden on parades, see *Eastern Connecticut Citizens Action Group* v. *Powers*, 723 F.2d 1050 (2d. Cir. 1983).

To the extent that heavy charges on speech activities inhibit the free flow of ideas, everyone is a loser. Citizen access to ideas and information vital to the informed participation in the political process is seriously hampered. Nonetheless, the city has contended since the outset of this case that its discriminatory practice is appropriate because parades are inferior to other uses of city streets. Thus it argued in the district court:

> ... [T]he plaintiff attempts to equate the participants of a parade with those who routinely utilize the public streets and highways. These two groups are obviously not equivalent. Those who participate in a parade do so in defiance of established traffic control devices and regulations. The composition of a parade usually incorporates a substantial number of pedestrians as well as unusual vehicles, both of which exercise exclusive control of the roadway. In contrast, routine vehicular traffic abides with traffic control devices and excludes no one from using the streets. It is a clear fallacy to equate these two activities ... Plaintiff must surely recognize the Constitution of the United States can expand to allow for growth in our society. We no longer have horses and buggies upon streets without sidewalks. (D. Ct. Jt. App. 49)

The district court and the court of appeals erroneously accepted this argument. The error lies in the fact that this case is about the payment of money for to the city treasury. It is not about maintenance of "peace and good order." *Hague* v. *CIO*, 307 U.S. at 516.

In fact, contrary to the view of the city and the courts below, parades and other speech activities protected by the First Amendment do not have an inferior right of access to public streets. Thus, this court said in *Schneider*

v. *State of New Jersey*, 308 U.S. 146, 151 (1939) "the streets are natural and proper places for the dissemination of information and opinion." The argument that the City of Columbus has successfully made below, that streets are not available for speech activities on the same basis as other activities is defective because it "is rooted in a bias against expressive conduct." *A Quaker Action Group* v. *Morton*, 516 F.2d 717, 725 (D.C. Cir. 1975).

The net impact of ordinances like Ch. 2111 has been the creation of a new barrier to the use of traditional public forums for speech activities and, consequently, growing governmental interference with free access to the marketplace of ideas.

II. THE USER FEES UPHELD IN THIS CASE VIOLATE WELL-ESTABLISHED FIRST AMENDMENT DOCTRINES FORBIDDING BURDENSOME CHARGES IN EXCESS OF NOMINAL AMOUNTS OR IN EXCESS OF ACTUAL GOVERNMENTAL COSTS.

One of the most basic doctrines of the First Amendment is the prohibition against revenue taxes on speech. *Murdock* v. *Pennsylvania*, 319 U.S. 105, 111 (1943). Ch. 2111 of the Columbus Municipal Code ignores this prohibition. It exacts a very heavy tax on speech in order to raise money for the municipal treasury. Indeed, the tax is so heavy that it precludes parades on Columbus streets by the poor.

A. Ch. 2111 is overbroad because it imposes a heavy tax on speech activities that is not limited to nominal, out-of-pocket administrative costs.

Pursuant to Ch. 2111, the City of Columbus charges parade sponsors substantial sums of money. It has not limited charges to the nominal amounts which impose no

significant burden on speech. The charges have been so burdensome that the American Legion moved its annual Veteran's Day parade out of Columbus rather than pay. (R.8: Tr.34-40)

To the extent that the Constitution allows the city to impose charges for permits and police services, the charges must be nominal so that they do not unduly burden First Amendment activities. This was made clear in *Cox* v. *New Hampshire*, 312 U.S. 569 (1941) and *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943). *Cox* was the first case to approve the imposition of limited permit fees. *Murdock* v. *Pennsylvania* reinforced *Cox* by overturning a license fee charged to door-to-door religious booksellers. The statute was defective because it imposed a fee of: "For one day $1.50, for one week seven dollars ($7.00), for two weeks twelve dollars ($12.00), for three weeks twenty dollars ($20.00) ...." The Court invalidated the fee because, "It was not a *nominal* fee imposed as a regulatory measure to defray the expenses of policing the activities in question." 319 U.S. at 113-14 (emphasis added). The fees were limited to nominal amounts because with heavier fees, expression of religious and political beliefs "... can be crushed and closed out by the sheer weight of the toll or tribute which is exacted town and town, village and village." 319 U.S. at 115.

Several lower courts have reached the same conclusion. For example, in *Central Florida Nuclear Freeze Campaign* v. *Walsh*, 774 F.2d 1515 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986), the Eleventh Circuit observed, "Although license fees are proper for the costs of administering an event, under the Supreme Court's decision in *Cox* v. *New Hampshire*, we read *Cox* as authorizing only nominal charges for the use of city streets and parks to further First Amendment activities.

An ordinance which charges more than a nominal fee for using public forums for public speech violates the First Amendment." 774 F.2d at 1523.[8] In addition, see *Eastern Connecticut Citizens Action Group* v. *Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983); *United States Labor Party* v. *Codd*, 527 F.2d 118, 120 (2d Cir. 1975); *Wendling* v. *City of Duluth*, 495 F. Supp. 1380, 1384 (D. Minn. 1980); *Invisible Empire Knights of the Ku Klux Klan* v. *City of West Haven*, 600 F. Supp. 1427, 1434 n.10 (D. Conn. 1985); *Invisible Empire Knights of the Ku Klux Klan* v. *Mayor, Board of Commissioners, and Chief of Police of Thurmont*, 700 F. Supp. 281, 286 (D. Md. 1988).

The court of appeals in this case explicitly and erroneously rejected the nominal fees standard by holding that the petitioners' reliance on *Murdock*'s nominal fees requirement was "misplaced." (A.17a-18a)

The court of appeals compounded its error by upholding Ch. 2111 even though the ordinance does not limit the fees to the city's out-of-pocket government costs. The record shows that nearly 30% of the $85 charge for a parade permit is attributable to the overhead of running the entire city. (R.26: Brown Dep. 30-34) Similarly, the hourly amount charged to parades for police services is set by labor negotiations between the city and the police union. It exceeds the hourly wage paid to police officers assigned to non-parade related duties. (A.54a) The charges for police services include a three hour minimum, even though the plaintiffs' parade only lasts for one hour. Finally, the car rental charge for police cruisers assigned to parades is based on

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8. See also *Nationalist Movement* v. *City of Cummings*, 913 F.2d 885 (11th Cir. 1990) *vacated* 921 F.2d 1125, *upon rehearing en banc, reinstated per curiam*, _____ F.2d_____, (July 5, 1991).

commercial car rental rates rather than out-of-pocket costs. The rental charge therefore contains a margin of profit. (R.26: Supp. Dist. Ct. App. 28 fr. Def. Ans. to Interrog. 7; R.26: Brown Dep. 54-55)

The court below approved city charges in excess of out-of-pocket expenses because it accepted the district court holding that the charges were not excessive or unreasonable and were reasonably related to actual costs. (A.18a) In reaching its erroneous conclusion, it cited no case which employed this standard.

In fact, the Sixth Circuit's novel standard conflicts with virtually all applicable decisions. *Cox* v. *New Hampshire* states that the charges for government services must be limited to the "expense incident to the administration of the Act and to maintenance of public order in the manner licensed." Similarly, *Murdock* v. *Pennsylvania* makes clear that a permit fee is impermissible unless it is confined to recoupment of actual costs. 319 U.S. at 112-114.

At least two circuits have reached the same conclusion. For example, in *Fernandes* v. *Limmer*, 663 F.2d 619 (5th Cir. 1981), *reh'g denied*, 669 F.2d 729, *cert. dismissed*, 458 U.S. 1124 (1982), the court invalidated a $6.00 per day fee for a permit to distribute religious literature because there was no showing that it was confined to actual administrative costs. It described the applicable standard as follows:

> A licensing fee to be used in defraying administrative costs is permissible, *Cox* v. *New Hampshire*, but only to the extent necessary. *Moffat* v. *Killian*, 360 F. Supp. 228, 231-32 (D. Conn. 1973) (invalidating fee imposed for legislative lobbying when in excess of the costs of administration); *NAACP* v. *City of Chester*, 253

> F. Supp. 707 (E.D. Pa. 1966) (invalidating $25.00 fee for use of a sound truck when defendant did not submit evidence justifying permit fee on the basis of administrative costs). 663 F.2d at 633.

See also *Gannett Satellite Information Network, Inc.* v. *Metropolitan Transportation Authority*, 745 F.2d 767, 774 (2d Cir. 1984), which states that "Ordinarily, a government cannot profit by imposing licensing or permit fees on the exercise of a First Amendment right ... Only fees that cover administrative costs of the permit or license are permissible."

B. Ch. 2111 violates the First Amendment because it precludes the poor from parading on city streets.

Ch. 2111 imposes an across-the-board charge for a permit and for police services on everyone who seeks to hold a parade, no matter how impecunious he or she may be. Indeed, Ch. 2111.08 explicitly states that "The provisions contained in this Chapter of the Code shall not be waiverable (sic) ...." As a consequence, at the time of the 1985 parade, the Stonewall Union, unable to make financial ends meet, was forced to go into debt to pay the heavy fee and charges imposed by the city. (R.8: Tr. 17-20) A deficit was again triggered in 1987 by imposition of the charges under Ch. 2111. (R.26: Suppl. Dist. Ct. App. 2; Cohen Aff., 6/26/87)

This Court has consistently held that when the exercise of fundamental constitutional rights is preconditioned on the payment of a fee to the government, the applicable law establishing the fee must include a provision for those with insufficient financial resources. Thus, in *Bullock* v. *Carter*, 405 U.S. 134 (1972), the Court invalidated a Texas primary election

scheme that required would-be candidates to pay significant sums of money to get on the ballot. The scheme was invalidated because, in the court's words, "the State of Texas has erected a system that utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice." 405 U.S. at 149.

The principle forbidding discrimination based on wealth has been applied by the lower courts to invalidate parade permit fee ordinances that make no provision for speakers unable to pay. For example, *Invisible Empire Knights of the Ku Klux Klan* v. *City of West Haven*, 600 F. Supp. 1427 (D. Conn. 1985), struck down an ordinance requiring the posting of a bond for police protection and forum maintenance by demonstrators seeking to use municipal parks and recreation facilities. According to the court in that case:

> ... [S]ection 5L makes no provision for applicants who, by reason of indigency cannot provide the necessary financial security. It has been well established in recent years that the exercise of fundamental constitutional rights cannot be conditioned upon an individual's wealth. *See e.g.*, *Beardon* v. *Georgia*, 461 U.S. 660 (1983) (state cannot revoke probation for inability to pay fine or make restitution); *Lubin* v. *Panish*, 415 U.S. 709 (1974) (otherwise valid candidate's filing fee cannot be required of an indigent); *Tate* v. *Short*, 401 U.S. 395 (1975) (jail term cannot be imposed in lieu of fine because of inability to pay fine). To the extent that section 5L requires payment of a bond for costs to those who can demonstrate

> their inability to obtain such a bond, it is declared unconstitutional. (600 F. Supp. at 1435)

See also *Central Florida Nuclear Freeze Campaign* v. *Walsh*, 774 F.2d 1523-1524.

The court of appeals in this case erroneously upheld Ch. 2111 in spite of the absence of an indigency exception. It mistakenly concluded that indigent paraders were not constitutionally entitled to an exception because the city was willing to let them use parks and sidewalks free of charge. However, in reaching this conclusion, the court of appeals ignored the repeated admonitions of this Court that restrictions on access to one category of traditional public forums cannot be justified by the argument that alternative forums are available.

In *Schneider* v. *State*, 308 U.S. 147 (1939), this Court rejected the claim that a municipality could prohibit use of public streets for leafletting because leafletters could use municipal parks instead. The Court observed that "... the streets are natural and proper places for the dissemination of information and opinion and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." 308 U.S. at 163. See also *Collin* v. *Chicago Park District*, 460 F.2d 746 (7th Cir. 1972) (overturns a denial of a permit at one public park even though the speaker was free to use another public park); *Sixteenth of September Planning Committee* v. *City and County of Denver, Colorado*, 474 F. Supp. 1333 (D. Colo. 1979) (invalidates flat restrictions on daytime parades in business district even though paraders could use alternative non-business district forums).

Moreover, contrary to the suggestion of the Sixth Circuit, a charge for police services cannot be justified by the time, place and manner doctrine. Earning money

for the municipal treasury pursuant to Ch. 2111 is a form of taxation that has nothing to do with scheduling parades and demonstrations, maintaining order, and avoiding undue disruptions. Similarly, removing orderly parades with impecunious sponsors from public streets lacks any rational connection to these valid municipal interests.

Indeed, the city's decision to force poor demonstrators to confine their parades to city sidewalks imposes an unconstitutional burden on speech activities on traditional public forums. If the city succeeds in confining parades with poor sponsors to public sidewalks it will have succeeded in diluting the communication between the paraders and their prospective audience. Thus, in this case, a sidewalk parade by petitioners would consist of a long line of 7500 participants whose presence on the sidewalks would displace the parade's intended audience. (D. Ct. Suppl. App. 74) It would also preclude the use of multiple floats and vehicles.

Compelling impecunious parade sponsors to forego use of the most effective means of communicating with their audience is constitutionally forbidden because, "[T]he First Amendment mandates that we presume that speakers, not the government, know best what they want to say and how to say it." *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 790-791 (1985). If the City of Columbus succeeds in its effort to move impecunious parade sponsors to the sidewalks, it will have succeeded in relegating civil rights parades to the status of second class users of public streets. In contrast, in Columbus, marathon runners, pedestrians, boxers, and war veterans will continue to receive municipal services traditionally provided free of charge. *City of Flagstaff* v. *Atchison T. & S. F. Ry*, 719 F.2d 322, 324 (9th Cir. 1983).

C. Ch. 2111 violates the First Amendment on its face and as applied because it grants the Defendants unbridled discretion to impose heavy and discriminatory charges on parades.

i. The City has exercised unbridled discretion in setting charges.

According to the terms of Ch. 2111.04, the charges for police services provided to a parade are set by the Director of Public Safety who may consider "such factors as the time, date, length, number of participants and vehicles contained in the application." (Ch. 2111.04) The ordinance authorization to consider "such factors" has resulted in use of an open ended range of factors.

For example, at his deposition, Lieutenant Karl Barth, the officer who determines special duty assignments and sets the amount parade sponsors must pay, testified that there were variables affecting his determination of police service charges which he was unable to specify. (R.26: Barth Dep. 26-29, 2/25/87) Instead, he makes his decisions on a case-by-case basis. Thus he stated, "I still have in the back of my mind that there could be a variable of some type" which he had not yet specified. In an affidavit, he specified variables he considers that could be affected by the message communicated by a parade. They include: "The estimated number of viewers" and "The nature, composition, format, and configuration of the parade or run." (A.44a)

The absence of narrow, objective, and definite standards has led to unpredictable sums being charged to petitioners as a prerequisite for their parades. In 1985, when petitioners applied to hold a parade with 3000 participants and three or four floats, the final charge for police services was $672.50. In 1986, when the petitioners applied to hold a parade containing 5000

people, twenty vehicles and three to five floats, the city charged the same $672.50. Yet when petitioners amended their 1986 application to state that only 3000 participants were expected, the $672.50 charge for police services was not reduced accordingly. In 1987, the charge jumped to $800. Moreover, the city has considered expanding charges to cover police assigned to streets peripheral to the parade route. (R.31: Cohan Aff.)

The use of such unbridled discretion in administering permits for speech activities has been forbidden in case after case by this Court. Thus, in *Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988), the Court stated:

> At the root of this long line of precedent is the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. E.g., *Shuttlesworth*, *supra*, at 151; *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Staub* v. *City of Baxley*, 355 U.S. 313, 321-322 (1958); *Kunz* v. *New York*, 340 U.S. 290, 294 (1951); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Saia* v. *New York*, 334 U.S. 558 (1948). And these evils engender identifiable risks to free expression that can be effectively alleviated only through a facial challenge.

ii. The standard to be applied on remand authorizes unconstitutional discrimination.

According to the court of appeals, the discretion to set fees includes the city's selective sponsorship, subsidizing, and waiving of charges for parades that are "reasonably related" to a government function. (A.21a)

There are no known standards or criteria that indicate who will ultimately be subject to the charges and who will be exempt. There is no procedure to qualify or apply for special treatment. As a result, no fees and charges were assessed for a large motorcade protesting the government closing of Ohio savings and loan institutions that required the assignment of over forty officers, a helicopter and a tow truck. The city sponsored a parade to honor Jerry Paige, a local boxer, after he won an Olympic gold medal and paid all costs associated with it. Similarly, no charges for permits or police services are imposed on funeral processions and the motorcades of political candidates.

While the court of appeals below found that the foregoing exemptions from charges for fees and services might be evidence of unlawful discrimination, it did not view them as evidence of the ordinance's unbridled discretion. On the contrary, it found that exemptions and other special treatment under Ch. 2111 would be constitutional if, on remand, Columbus could establish that they were "reasonably related to the government function which the sponsoring department of city government performs." (A.21a)

As a standard for the regulation of speech, the lower court's standard suffers the same vagueness this Court found in the proposed standard "airport related." *Board of Airport Commissioners* v. *Jews For Jesus, Inc.*, 482 U.S. 569, 576 (1987). The "reasonably related" to a "government function" standard provides no advance notice as to which parades will qualify and no objective guidance to groups as to whether they might qualify.

In addition, the standard proposed by the court of appeals for evaluation of the cases of special treatment under Ch. 2111 ignores the First Amendment prohibition against special government preferences for speech

activities because the government favors particular viewpoints. According to this Court's opinion in *Police Department of The City of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972):

> Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Thus, once the city makes exceptions for some in imposing fees, the insistence that others continue to pay the same fees is inconsistent with the First and Fourteenth Amendments.

Nor can the city escape its obligation to treat all parades equally by continuing to subsidize or waive charges for the parades that it favors and refusing to waive charges for the Stonewall parade. *A Quaker Action Group* v. *Morton*, 516 F.2d 717 (D.C. Cir. 1975), invalidated the National Park Service's similar practice of selectively co-sponsoring events which would then be exempted from permit requirements. The Court of Appeals for the District of Columbia Circuit observed:

> We are troubled by the lack of any expressed standard for selection of "NPS events," and by the total absence of an announced procedure for such selection. In view of the Park Service's record in this and other cases, the lack of standards and procedures gives rise to the concern that the Park Service may discriminate against first amendment activity by selective granting or withholding of "NPS event" status

> and of the accompanying exemption from the ordinary permit requirements. (516 F.2d at 728)

The error of the court of appeals in this case lies in the court's refusal to follow cases like *Lakewood* v. *Plain Dealer Publishing Co.*, *Police Department of the City of Chicago* v. *Mosley*, and *A Quaker Action Group* v. *Morton*. Thus, it approved vague and sweeping discretion that has led to discriminatory parade subsidies and fee waivers.

The court of appeals attempted to justify its approval of content-related discrimination by citing *Harris* v. *McRae*, 448 U.S. 297 (1980). In that case, this Court upheld Congress's exercise of its Article I spending powers to deny subsidies for medically necessary abortions while providing subsidies for other medically necessary surgical procedures. The Sixth Circuit incorrectly analogized Congress's exercise of its Article I spending and taxing powers to the police power of municipal governments to provide law enforcement services. Thus it observed, "[A]lthough plaintiffs have a right to parade on behalf of gay and lesbian rights, they do not have a right to demand that the City of Columbus sponsor that right by paying their parade permit fees because it sponsors other speech related activities." (A.21a).

The court of appeals' reliance on the *Harris* v. *McRae* interpretation of Congress's spending power is completely misplaced. In fact, *Harris* upheld the power of Congress to pick and choose among potential recipients of federal subsidies. 448 U.S. at 314. This case, however, does not involve the optional subsidies at issue in the *Harris* line of cases. Unlike *Harris*, this case challenges an ordinance that the city has employed to require some, but not all, speakers to assume the cost of

the city's obligation to provide unburdened access to traditional public forums.

Moreover, in *Rust* v. *Sullivan*, __U.S.__, 111 S.Ct. 1759, (1991), this Court was careful to point out that *Harris*'s approval of selective Congressional decisions under Article I to subsidize particular messages did not apply to speech on traditional public forums. Thus, the *Rust* court observed:

> ... [T]his court has recognized that the existence of a government "subsidy" in the form of Government-owned property, does not justify the restriction of speech in areas that have "been traditionally opened to the public for expressive activity," *United States* v. *Kokinda*, 110 S. Ct. 3115, 3119 (1990); *Hague* v. *CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.), or have been "expressly dedicated to speech activity." *Kokinda*, *supra*, 110 S. Ct. at 3119; *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983)

Unlike the services at issue in *Harris*, there is no alternative source of supply for the public streets. A speaker who cannot get city approval must choose between paying for the streets or cancelling his or her parade.

III. THE DECISION IN THE COURT BELOW CREATES A CONFLICT BETWEEN THE SIXTH CIRCUIT AND THE ELEVENTH CIRCUIT OVER FUNDAMENTAL FIRST AMENDMENT ISSUES.

One of the principal contentions made by the petitioners in challenging the validity of Ch. 2111 was that the charges exceeded the nominal amount allowed for in *Cox* v. *New Hampshire* and *Murdock* v. *Pennsylvania*. In making this argument petitioners relied on *Central Florida Nuclear Freeze Campaign* v. *Walsh*, 774 F.2d 1515 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986), which stated that "The *Murdock* ruling therefore indicates that *Cox* should be read as authorizing a municipality's charging of fees for the use of the public streets only when such fees are both nominal and related to the expenses incidental to the policing of the event." 774 F.2d at 1522. The Eleventh Circuit reaffirmed its adherence to the nominal fees rule in *Nationalist Movement* v. *City of Cummings*, 913 F.2d 885 (11th Cir. 1990). The opinion was vacated in 921 F.2d 1125, and, upon rehearing *en banc*, the Eleventh Circuit in a *per curiam* order reinstated the panel opinion, _____ F.2d _____ (July 5, 1991).

The Sixth Circuit rejected the *Walsh-Cummings* nominal fees rule as authority in deciding this case with the following observation:

> Plaintiffs argue that under the First Amendment only a nominal fee may be charged for a parade license and the Columbus ordinance is unconstitutional because it does not limit charges to nominal amounts. Plaintiffs rely on *Central Florida Nuclear Freeze Campaign*, 774 F.2d at 1523 for this proposition [footnote omitted], but we believe this case misreads *Cox* as permitting only nominal charges for policing a parade. The

> fee approved in *Cox* was not nominal, but instead ranged "from $300 to a nominal amount." 312 U.S. at 576. The court found nothing contrary to the Constitution in the charge of a fee limited to the purpose of meeting the expenses incident to the administration of the licensing statute and to the maintenance of public order. (A.16a-18a)

The Sixth Circuit's rejection of the Eleventh Circuit's nominal fees rule was erroneous. The source of the error lies in the fact that the Sixth Circuit misread *Cox* v. *New Hampshire*. There, no fee had been charged or paid. The paraders in that case had refused to apply for a permit. Therefore, contrary to the suggestion of the Sixth Circuit, no specific fee was approved by the Court, only a statutory provision authorizing a nominal fee limited to actual expenses. This was confirmed in *Murdock* v. *Pennsylvania*, 319 U.S. 105, 113-114 (1943) and *Follett* v. *Town of McCormick*, 321 U.S. 573 (1944) which invalidated burdensome taxes capable of discouraging speech activities.

The conflict in the circuits is underscored by the fact that the Sixth Circuit's position is also inconsistent with the Second Circuit's position. Thus, in *United States Labor Party* v. *Codd*, 527 F.2d 118, 120 (2d Cir. 1975) the Second Circuit stated that the First Amendment limits permit fees to "nominal amounts."

To the extent that this conflict between the circuits is allowed to stand, it invites municipalities across the country to adopt ordinances similar to Ch. 2111. The consequence of widespread adoption of this standard will be realization of the fear expressed in *Murdock* v. *Pennsylvania* that political beliefs "... can be crushed and closed out by the sheer weight of the toll or tribute which is exacted town and town, village and village." 319 U.S. at 115.

CONCLUSION

The petitioners therefore urge this Court to grant their petition for a writ of certiorari so that it may review the important First Amendment issues raised in this case.

Respectfully submitted,

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APPENDIX

ARTICLE THREE - Street and Traffic Control Devices

Chap. 2111. Parades, Processions and Other Moving Assemblages.
Chap. 2113. Traffic Control Devices.

CHAPTER 2111

Parades, Processions and Other Moving Assemblages

2111.01 Definition.
2111.02 Permit required.
2111.03 Application for permit.
2111.04 Traffic control.
2111.05 Standards for issuance of permit.
2111.06 Notice of rejection of application for a permit.
2111.07 Appeal procedure.
2111.08 Nonwaiverability.
2111.09 Penalty.

Cross References
Power to regulate processions or assemblages - see Ohio R.C. 4511.07(C)

2111.01 Definition.

For purposes of this chapter, "parade" shall mean any procession or moving assemblage upon any street or public thoroughfare other than routine vehicular traffic or a funeral procession. (Ord. 1264-84.)

2111.02 Permit required.

(a) No person or organization shall engage in, participate in, aid, form, or conduct any street parade, without first obtaining a permit from the Director of Public Safety.

(b) Exception. This section shall not apply to, nor shall a permit be required in the following instances except as specifically indicated:

(1) Funeral processions;

(2) Picketing conducted off the street or roadway. (Ord. 1264-84.)

2111.03 Application for permit.

Any person or organization seeking a parade permit shall file an application with the License Section, Department of Public Safety, upon a form provided by the License Section.

(a) Filing period.

The application for a parade permit shall be filed not more than one hundred and eighty (180) days and not less than five (5) days before the time intended for such parade. For good cause shown, applications may be accepted after the five (5) days limit. Good cause shall be shown when the application can be processed in compliance with the provisions of this chapter in sufficient time to allow the parade to proceed as scheduled.

(b) Contents.

The application shall at least include the following:

(1) The name and address of the organization sponsoring the parade;

(2) The name and address of the person in charge of the parade;

(3) The date when the parade is to be conducted;

(4) The name of the parade;

(5) The time the parade will begin to form, and the time the parade will begin movement;

(6) The place where the parade will form;

(7) The route of the parade;

(8) The approximate number of participants not including spectators who will participate in the parade;

(9) The number of autos, floats, or bands in the parade;

(10) The place where the parade will disband;

(11) Prior parade history of the organization involved;

(12) Any other information required by the Director of Public Safety to perform the duties described herein.

(c) Fee.

A fee of eighty-five dollars ($85.00) to cover the expenses incident to processing the application for parade permit shall be paid to the City of Columbus when filing an application for a parade permit. (Ord. 1264-84.)

2111.04 Traffic control.

In reviewing the application for parade permit, the Director of Public Safety shall determine the number of police officers reasonably necessary to control traffic in the area of the requested parade. In making this determination, the Director of Public Safety shall consider such factors as the time, date, route, length, number of participants and vehicles contained in the application for the parade permit. The Director of Public Safety shall inform the applicant for the parade permit of the number and cost of police officers and vehicles which he determines to be necessary to control the traffic for the requested parade. The cost for each police officer shall be the current standard hourly special duty rate. The cost for each police vehicle shall be the standard hourly rental rate prescribed by the Director of Public Safety. The applicant for a parade permit shall deposit the amount of money designated by the Director of Public Safety as necessary for police traffic control and police vehicles with the Traffic Bureau of the Columbus Division of Police forty-eight (48) hours prior to the date requested for the parade. (Ord. 1264-84.)

2111.05 Standards for issuance of permit.

The Director of Public Safety shall issue a parade permit as provided for hereunder when, from the consideration of the application and from other information as may otherwise be obtained, it appears that:

(a) The conduct of the parade will not substantially interrupt the safe and orderly movement of other pedestrian or vehicular traffic in or contiguous to the route or location of the parade.

(b) The concentration of persons, animals and/or vehicles at the parade will not interfere unduly with proper fire and police protection of or ambulance service to areas contiguous to the assembly area or other areas of the City.

(c) The conduct of the parade will not result in noise at a level inappropriate to the area surrounding the parade.

(d) The applicant has secured the police officers required under Section 2111.04 of this chapter and has prepaid the expenses therefor.

(e) The parade is not to be held for the primary purpose of advertising any product, goods, or event which is primarily for private profit and the parade itself is not primarily for profit provided, however, the prohibition against advertising any product, good or event shall not apply to signs identifying organizations or sponsors furnishing or sponsoring exhibits or structures used in the conduct of the parade.

(f) Such parade will not interfere with previously scheduled activities or with scheduled maintenance or repair work to be carried out on the streets or thoroughfares to be used. (Ord. 1264-84.)

2111.06 Notice of rejection of application for a permit.

The Director of Public Safety shall act upon the application for a permit within seventy-two (72) hours after the filing thereof. If for any reason a longer period of time is required, the reason for such a delay shall be

provided in writing to the applicant. If the Director of Public Safety disapproves the application, he shall make a reasonable effort to notify the applicant, either by personal delivery or certified mail, a copy of the notice of rejection and the reason therefor shall be available in the office of the License Section, within twenty-four hours of his actions. (Ord. 1264-84.)

2111.07 Appeal procedure.

Any applicant shall have the right to appeal the denial of a permit to the Board of License Appeals. All appeals shall be made pursuant to the provisions of Chapter 505 of the City Codes. The Board shall consider the appeal in accordance with the provisions of Chapter 505 of the City Codes unless a delay will preclude the applicant from conducting its parade. If such a delay occurs, then the Board shall conduct a hearing in sufficient time to allow the applicant to conduct the parade if the appeal is granted. The Board shall direct the Director of Public Safety forthwith to issue a permit, unless using the standards, contained in Section 2111.05, good cause shall be made to appear for the denial. (Ord. 1264-84.)

2111.08 Nonwaiverability.

The provisions contained in this chapter of the Code shall not be waiverable by Columbus City Council for any applicant desiring to conduct a parade, procession or other moving assemblage upon the streets or roadways of the City of Columbus. (Ord. 1264.84.)

2111.99 Penalty.

Whosoever violates Section 2111.02 is guilty of conducting a parade without a permit, a misdemeanor of the fourth degree. (Ord. 1264.84.)

No. 90-3643

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

STONEWALL UNION AND CRAIG COVEY,
Plaintiffs-Appellants,

v.

CITY OF COLUMBUS, ALPHONSO MONTGOMERY, and DWIGHT JOSEPH,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed May 6, 1991

Before: KEITH and MARTIN, Circuit Judges; and CONTIE, Senior Circuit Judge.

CONTIE, Senior Circuit Judge. Plaintiffs-appellants, Stonewall Union and Craig Covey, appeal the district court's grant of summary judgment to defendants-appellees, City of Columbus, Alphonso Montgomery, Director of Public Safety, and Dwight Joseph, Chief of the Division of Police, in this action which challenges the constitutionality of a City of Columbus ordinance requiring fees for a parade permit. For the following reasons, we affirm in part and reverse in part.

I.

Plaintiffs-appellants, Stonewall Union and Craig Covey, bring this action challenging the constitutionality of the City of Columbus ordinance regulating parades, processions and other moving assemblages. Section 2111.03 of the Columbus Municipal Code requires an applicant for a parade permit to pay an $85.00 fee to cover the expenses incident to processing the application for a parade permit. Section 2111.04 requires the applicant to pay for the cost of police officers and police vehicles which the Director of Public Safety determines are necessary to control traffic along the route of the planned parade.

Stonewall Union is a nonprofit civil rights organization formed for the purpose of advocating and supporting the civil liberties of gay and lesbian persons. One of the ways in which it carries its message to the public is by holding an annual gay rights parade on the fourth Sunday in June in downtown Columbus. The parade has been an annual occurrence since June 1982 and is held in conjunction with similar parades by gay rights organizations in other large cities throughout the United States.

In March 1985, Craig Covey, the executive director of Stonewall Union, sought a permit on behalf of the Union that would authorize it to hold a parade in June 1985. Covey also sought two additional permits for related activities: one allowing the Union to assemble its parade in Goodale Park and the other authorizing an assembly on the Ohio Statehouse grounds where speeches would be made at the conclusion of the parade.

Stonewall Union obtained permits to hold its assemblies from the city's park department and the State of Ohio respectively free of charge. The City of Columbus License Section, however, refused to accept an $85.00 check from Mr. Covey to pay for the parade permit

processing fee until the Union presented it with a receipt showing prepayment of the fee for police services.

Under the Columbus ordinance, before conducting a parade upon city streets, the organizer must first obtain a permit and prepay a fee representing the cost for processing the permit application and the predetermined cost for the maintenance of traffic control along the parade route. The process begins when an applicant submits a parade permit application and pays a filing fee of $85.00 to the city's license section. The application is then forwarded to the Columbus Police Traffic Bureau for a determination of the number of police officers and vehicles necessary to control traffic along the designated parade route. The applicant is then required to prepay the cost for traffic control before the permit is issued. In the present case, the total amount due was $757.50, representing $85 for the parade permit fee and $672.50 for the necessary traffic control services.[1]

Plaintiffs contend that the fee requirements run afoul of the First Amendment as applied to the states by the Fourteenth Amendment. Although they paid the fee and held the parade as they have done every year since 1985, plaintiffs filed suit on May 16, 1985 in the United States District Court for the Southern District of Ohio. On May 30, 1985, plaintiffs filed a motion seeking a preliminary injunction to compel the City of Columbus to issue a parade permit to Stonewall Union without requiring payment of a permit application fee in the

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[1]The exact amount to be prepaid by Stonewall Union is in dispute. Plaintiff Craig Covey claims that the Columbus Police Traffic Bureau informed him that twenty-three police officers and five police vehicles would be assigned for traffic control purposes at a cost of $1,090.70. The City of Columbus contends the original sum was $672.50, with the increase in cost resulting from the addition of five extra officers pursuant to Covey's request. The district court concluded that this dispute did not preclude the court from resolving the case for the exact amount charged is immaterial. We agree. The essence of plaintiffs' claim is that "user fees" imposed for exercising constitutional rights are unconstitutional. Thus, as long as the fee exceeds a nominal amount, the issue before the court remains the same regardless of the exact amount in dispute.

amount of $85.00 and costs for traffic control incident to the parade. In response to the plaintiffs' motion for a preliminary injunction, the defendants filed a memorandum in opposition to the preliminary injunction and a motion for summary judgment. On June 20, 1985, the district court denied the plaintiffs' application for a preliminary injunction and on June 25, 1985, denied a request by the plaintiffs for a stay pending appeal. The Court of Appeals for the Sixth Circuit thereafter affirmed the district court's judgment on May 24, 1986. The United States Supreme Court denied plaintiffs' application for a stay on June 17, 1986. On July 14, 1986, this court denied the plaintiffs' petition for rehearing en banc. Finally, the plaintiffs filed a cross-motion for summary judgment. The district court granted defendants' motion for summary judgment on June 28, 1990, and plaintiffs timely filed this appeal.

II.

Plaintiffs first argue that the Columbus ordinance is unconstitutional on its face because it creates a use tax and operates as a prior restraint that abridges plaintiffs' freedom of speech in violation of the First Amendment, because no parade can be held on city streets without prepaying the city for a permit and the police services required by the parade.

The leading case on the constitutionality of regulations governing the use of public streets for parades is *Cox v. New Hampshire*, 312 U.S. 569 (1941). In *Cox*, a state statute requiring marchers to obtain a license and to pay a fee of not more than $300.00 before parading on public streets was attacked as an unconstitutional abridgement of First Amendment rights. In upholding the validity of the state law, the Supreme Court explicitly recognized the right of a municipality to impose regulations governing the use of public streets for the maintenance of public order.

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions.

Id. at 574. The question in each case is whether the traditional right to regulate the use of the streets for parades is exercised by the municipality so as "not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." *Id.* The Supreme Court determined that the statute in *Cox* involved only considerations of "time, place and manner so as to conserve the public convenience" and found that the limited authority conferred on the licensing board did not contravene any constitutional right. *Id.* at 575-76.

Of special significance to the present case is the Court's consideration in *Cox* of the constitutionality of a requirement that a fee be paid in advance in order to obtain a parade license. The New Hampshire Supreme

Court had construed the statute as requiring a "reasonable fixing of the amount of the fee," which could vary from a nominal amount up to $300, depending on the length of the parade, the crowds drawn, and the public expense of policing the spectacle. In referring to the fee charged, the Court stated:

> The fee was held to be "not a revenue tax, but one to meet the *expense incident to the administration of the Act and to the maintenance of public order in the matter licensed." There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated.* The suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair schedule to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.

Id. at 577 (emphasis added).

In the face of this explicit language in *Cox*, plaintiffs urge this court to either ignore it as dictum or to disregard it as outdated. However, we believe that *Cox* is dispositive of this issue. The Supreme Court considered a municipality's right to impose a license fee for parade permits and found that as long as the fee was designed to meet the expenses incident to the administration of the law and the cost of maintaining public order for the parade, such a charge did not impermissibly burden First Amendment rights.

Subsequent Supreme Court cases do not suggest otherwise. In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), decided only three years after *Cox*, the Court found unconstitutional a city ordinance which required a religious group to pay a flat license fee as a condition for conducting its distribution activities. The Court concluded that the licensing fee was essentially a licensing

tax because the fee was "fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues." Nor was it a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. Nor was it in any way apportioned. *Id.* at 113-14. In the present case, as in *Cox* and unlike *Murdock*, the City of Columbus seeks to recoup the expenses incurred in processing and issuing the parade permit and in providing traffic control. Although the fee assessed for processing the permit is a flat fee, the $85.00 is directly apportioned to the administrative cost of processing the permit application. The cost assessed for traffic control is dependent on relevant factors such as time, date, route length, the number of participants, and the number of vehicles. For these reasons, we find that the fees at issue resemble the costs imposed in *Cox* and are not designed to extract a tax on those who choose to exercise their First Amendment rights as was the case in *Murdock*.

In *United States v. Grace*, 461 U.S. 171 (1983), the issue before the Court was the constitutionality of an ordinance that placed an absolute prohibition on the exercise of First Amendment rights in the Supreme Court building, on its grounds, and on the public sidewalks in front of the Supreme Court building. Plaintiffs argue that the Court's discussion of the nature of streets, sidewalks, and parks and the severe restrictions on the government's ability to permissively regulate expressive conduct undermines *Cox*. The Court in *Grace* stated:

> "[P]ublic places" historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be "public forums." In such places, the government's ability to permissibly restrict expressive conduct is very limited.

Id. at 177 (citations omitted). The *Grace* Court found the ordinance unconstitutional as applied to the public sidewalks surrounding the Court building because it could

not be justified as a reasonable place restriction. *Id.* at 183. However, contrary to plaintiffs' contention, the *Grace* decision reaffirms the ability of a governmental entity to restrict expressive conduct by "reasonable time, place, and manner regulations as long as the restrictions are 'content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" *Id.* at 177.

Application of the standards articulated in *Grace* to the Columbus ordinance indicates that it is a constitutionally permissible regulation of expressive conduct. On its face, the ordinance is content-neutral. It is tailored to serve a significant government interest in protecting the public, protecting the paraders, and promoting the public convenience in the use of streets by requiring professional police officers to be used for traffic control. These objectives could not be achieved through less restrictive means. There are ample alternative channels of communication available to plaintiffs, who are free to use the sidewalks for their march to the Statehouse without payment of any fee,[2] and who may assemble in Columbus parks without paying a fee.

For these reasons, we find that the Columbus ordinance on its face is a constitutionally permissible, content-neutral, time, place, and manner regulation of expressive conduct rather than an impermissible prior restraint or use tax.

III.

Plaintiffs also contend that the ordinance is facially unconstitutional because the Director of Public Safety is vested with unrestricted discretion in establishing the amount the parade applicant is assessed for police

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[2]On May 18, 1985, approximately 5,000 members of the Boy Scouts of America celebrated their Diamond Jubilee by marching to the State capitol building. The march was conducted on the public sidewalks without the requirement of a street parade permit or the payment of a fee.

services. Specifically, plaintiffs challenge the procedure by which the number of police officers required to supervise the safe execution of the parade is determined by the Director of Public Safety, arguing that the ordinance contains inadequate standards, and consequently, lends itself to administrative manipulation and potential bias.

It is well recognized that an ordinance which grants an administrative body or government official unfettered discretion to regulate the licensing of activities protected by the First Amendment is unconstitutional. *Kunz v. New York*, 340 U.S. 290, 294 (1951). Such unrestricted discretion increases the likelihood that the government official may discriminate based upon the content of the "speech" or the viewpoint of the speaker. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763-64 (1988); *Cox v. Louisiana*, 379 U.S. 536, 557-58 (1965).

However, we do not find the Columbus ordinance to be such an ordinance. Section 2111.04 of the Columbus ordinance provides that the following factors are to be considered in determining the number of officers necessary for policing a parade: time, date, route, length, number of participants and vehicles. Lt. Karl Barth of the police department stated in an affidavit to the district court that standard criteria are used to determine the optimal number of police officers required, which include the following:

(1) The proposed route and the designated route for the parade.

(2) The time of day that the event is to take place.

(3) The date and day of the week proposed.

(4) The general traffic conditions in the area requested, both vehicular and

pedestrian. Special attention is given to the rerouting of the vehicles or pedestrians normally using the requested area.

(5) The number of marked and unmarked intersections along the route requested, together with the traffic control devices present.

(6) If traffic must be completely rerouted from the area, then the number of marked and unmarked intersections and the traffic control devices are taken into consideration.

(7) The estimated number of participants.

(8) The estimated numbers of viewers.

(9) The nature, composition, format and configuration of the parade or run.

(10) The anticipated weather conditions.

(11) The estimated time for the parade, run or event.

We believe these criteria constitute objective and definitive standards related to traffic control to guide the licensing authority and prevent unfettered discretion.

Plaintiffs make much of the fact that the police officer charged with responsibility for determining the amount of police support required commented that "I still have in the back of my mind that there could be a variable of some type," alleging that this remark indicates that decisions are subjectively based. Although the officer conceded that there may remain an unknown variable, it is evident that this variable is related to traffic control. Although one of the variables involves "the nature . . . of the parade," it is

clear that when read in context this variable is related to the size of the parade and estimated number of viewers, not the degree of hostility or violence the parade may evoke.

Plaintiffs rely on cases in which the fee assessed depended on the controversial nature of the rally and the potential for hostile counter activity, *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1517 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986), or on cases in which the petitioner must post bond for police protection or obtain special event insurance coverage based on the content of the speech. *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 285 (D. Md. 1988); *Invisible Empire of the Knights of the Ku Klux Klan v. City of West Haven*, 600 F. Supp. 1427, 1429 (D. Conn. 1985). The fees assessed in these cases depended on the administrator's assessment of the amount of hostility likely to be created by the parade based on its content. The Supreme Court has repeatedly rejected the restriction of expression protected by the First Amendment based on a fear of violence. *Gooding v. Wilson*, 405 U.S. 518 (1972); *Brandenberg v. Ohio*, 395 U.S. 444 (1969); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). In contrast, the Columbus ordinance does not permit speculation about the degree of violence a parade may provoke, but instead protection of the marchers is provided without consideration of its cost. Because the Columbus ordinance contains objective standards related to traffic control and not related to speculation about the potential for disturbances based on the parade's content, we find that the scheme for assessing the costs of traffic control is not unconstitutional.

IV.

Plaintiffs argue that under the First Amendment only a nominal fee may be charged for a parade license and the Columbus ordinance is unconstitutional because it does not limit charges to nominal amounts. Plaintiffs rely on

Central Florida Nuclear Freeze Campaign, 774 F.2d at 1523 for this proposition,[3] but we believe this case misreads *Cox* as permitting only nominal charges for policing a parade. The fee approved in *Cox* was not nominal, but instead ranged "from $300 to a nominal amount." 312 U.S. at 576. The Court found nothing contrary to the Constitution in the charge of a fee limited to the purpose of meeting the expenses incident to the administration of the licensing statute and to the maintenance of public order. *Id.* at 577.

Plaintiffs also rely on *Murdock v. Pennsylvania*, 319 U.S. at 116, but *Murdock* did not overrule *Cox*'s endorsement of charges greater than a token amount. Although the Court in *Murdock* invalidated a flat license fee levied on distributors of religious literature, the Court distinguished *Cox*, stating that in reviewing the Pennsylvania ordinance, it was not confronted with a state regulation of the streets to protect and insure the safety, comfort, or convenience of the public.

> Furthermore, the present ordinance is not narrowly drawn to safeguard the people of the community in their homes against the evils of solicitations. As we have said, it is not merely a registration ordinance calling for an identification of the solicitors so as to give the authorities some basis for investigating strangers coming into the community. And the *fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors.*

Id. (emphasis added) (citations omitted). We believe that plaintiffs' reliance on the *Murdock* Court's use of the

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[3]The other case on which plaintiffs rely for this proposition, *Nationalist Movement v. City of Cumming*, 913 F.2d 885, 891 (11th Cir. 1990), was vacated and a rehearing en banc was scheduled during the week of February 11, 1991. 921 F.2d 1125 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 767 (1991).

word "nominal" is misplaced. The basis of the *Murdock* decision was that the flat license tax was not justified by any legitimate state interest, not that it exceeded a nominal amount. The reasoning in *Cox* establishes that parade permit fees are constitutionally permissible as long as they are attributable to the cost of administrating the statute and ensuring public safety. *See Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983) (license fee invalidated because plaintiffs failed to show that the fee charged was equal to the administrative costs incurred); *Fernandes v. Limmer*, 663 F.2d 619, 633 (5th Cir. 1981) (licensing fee to be used in defraying administrative costs is permissible if not in excess of costs of administration), *cert. dismissed*, 458 U.S. 1124 (1982); *Baldwin v. Redwood City*, 540 F.2d 1360, 1372 (9th Cir. 1976) ("In some circumstances a city may both require a permit for activity involving free expression without violating the First Amendment and also collect fees that fairly reflect costs incurred by the city in connection with such activity"), *cert. denied*, 431 U.S. 913 (1977).

We believe the district court in the present case articulated the correct test for assessing whether the fees were unconstitutionally burdensome to the exercise of plaintiffs' First Amendment right to parade -- whether the fees were reasonably related to the expenses incident to the administration of the ordinance and to the maintenance of public safety and order.

Plaintiffs' argument that the fees were excessive and constituted a profit for the city is not borne out by the record. For example, the fact that it takes only a few minutes to process a license does not mean that the fee must be determined by the amount of time it takes to process. Instead, the City of Columbus used the "full cost" accounting method, which an employee of David M. Griffith and Associates, the accounting firm hired by the city to calculate the cost, stated was the standard approach to government cost accounting. Although plaintiffs disagree with the way the fees are calculated, we do not

believe that unless they can demonstrate that the costs are excessive or unreasonable that they have a constitutional claim. We don't believe, for example, that it would be appropriate for this court to tell a city that it must use regular police, rather than special-duty police, to supervise the parade and to assess costs on this basis. As the Supreme Court in *Cox* stated, "We perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought." 312 U.S. at 577. In the present case, there is no evidence that the fees were charged for anything other than processing costs and traffic control. Because we find no evidence that these fees were excessive or unreasonable, we do not find that the amount of the fees impermissibly burdened plaintiffs' First Amendment rights.

V.

Plaintiffs next contend that the ordinance is unconstitutional because it does not provide an exemption for indigent speakers or groups. Plaintiffs rely on a number of cases involving either the electoral process, *Lubin v. Panish*, 415 U.S. 709, 722 (1974); *Bullock v. Carter*, 405 U.S. 134, 149 (1972), or demonstrations, *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. at 286; *Central Florida Nuclear Freeze Campaign*, 774 F.2d at 1523; *Invisible Empire of the Knights of the Ku Klux Klan v. City of West Haven*, 600 F. Supp. at 1435. However, all of these cases are factually distinguishable from the present case in one important way. In each of these cases, failure to satisfy the fee prerequisite precluded the prospective participants' involvement in the constitutionally protected activity. In contrast, in the present case, an alternative forum is available -- the Columbus sidewalks which parallel the streets are free for purposes of conducting a parade and the parks are available without cost for related speech activities. The cases on which plaintiffs rely for the proposition that

alternative forums have been found to be unacceptable deal with failure to administer a license application process in a content-neutral manner, *Collin v. Chicago Park District*, 460 F.2d 746, 752 (7th Cir. 1972), or blanket prohibitions, *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939); *Sixteenth of September Planning Committee v. City of Denver*, 474 F. Supp. 1333, 1340 (D. Colo. 1979). In the present case, on its face, the ordinance is not content-specific and does not create a blanket prohibition. Because we believe the availability of the sidewalks and parks provides a constitutionally acceptable alternative for indigent paraders, we find that the lack of an indigency exception does not render the ordinance constitutionally invalid.

VI.

To conclude, we believe that all of plaintiffs' "unconstitutional on its face" arguments fail and the ordinance passes constitutional muster as it is presently worded. However, even if the ordinance is facially valid, we must determine whether it is discriminatorily applied. As the Supreme Court in *Cox* stated, the requirements for a parade permit license and fees must be administered with "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination." 312 U.S. at 576.

Plaintiffs assert two different arguments. The first argument is that because the City of Columbus sponsors some parades and pays for the permit fees out of city funds, it is waiving the fee for some groups in violation of the ordinance's express prohibition against waivers, §2111.08, and is not applying the ordinance in a content-neutral manner. However, the First Amendment guarantee of freedom of speech does not mean that the government must provide funds for or sponsor all speech equally. In the abortion arena, the Supreme Court upheld the constitutionality of the Hyde Amendment, which prohibited the use of federal medicaid funds to perform

abortions. *Harris v. McRae*, 448 U.S. 297 (1980). The Court indicated that the government may sponsor health care programs for pregnant women without sponsoring abortion, because "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Id.* at 316. Likewise, in the present case, although plaintiffs have a First Amendment right to parade on behalf of gay and lesbian rights, they do not have a right to demand that the City of Columbus sponsor that right by paying their parade permit fees because it sponsors other speech-related activities. If defendants can adequately show that the parades which they have sponsored and for which they have paid the permit fees are reasonably related to the government function which the sponsoring department of the city government performs, the fact that the City of Columbus sponsors and pays the parade permit fees for certain activities related to government functions does not mean that the ordinance is discriminatorily applied.

Plaintiffs also argue that the City of Columbus makes frequent exemptions in charges for permit fees and police services, which indicate that the ordinance is discriminatorily applied. We believe a rational distinction can be made between two activities which the city has determined do not constitute "a parade." A funeral procession is not a parade because it does not require the closing off of streets, but requires only that the cars involved will be allowed to continue through red lights in order to keep the procession together. This procession does not interfere with the flow of traffic in the same way that a parade does, which requires the closing off of entire streets. A presidential motorcade involves the coordination of both federal and state police and officials and is incident to the security provided to all presidential candidates. We believe it is, therefore, reasonable for the city to make an exception for presidential motorcades, because security detail can be distinguished from a parade.

However, plaintiffs have described other exceptions, which they allege constituted a "parade," for which a permit and fees were not required. We will discuss three as an example.

The first instance is the city's alleged payment of the fee for the Columbus Dispatch's 10 K run. The 10 K run is sponsored by a Columbus newspaper -- the Columbus Dispatch. If a profit-making entity sponsors an event and receives publicity by so doing, we don't believe it is appropriate for the City of Columbus to pay the parade permit fees. At her deposition, Sally Freeman, the supervisor of the license section, identified a city payment authorization showing that the city had paid the $85.00 fee for the June 5, 1986 10 K Columbus Dispatch run. Although defendants concede that the Department of Recreation and Parks was reimbursed by the sponsoring newspaper, even if the Columbus Dispatch did reimburse the city, it did not pay the fee up front as required by the ordinance, which may provide some evidence of inconsistent enforcement.

The second instance is the procession of motor vehicles en route from Cincinnati and Dayton that used the Columbus streets on March 20, 1985 to protest the closing of all Ohio savings and loan institutions. Defendants allege that this procession was a motorcade, not a parade, because the procession was not in exclusive use of the streets. Plaintiffs allege that the city assigned 41 police officers, a police helicopter and a wrecker to the event. Of the total number of officers, 23 were assigned to specific intersections along the procession's route. If this allegation is true, we do not think that the fact that the procession was not in exclusive use of the streets provides a viable distinction. The district court concluded as a matter of law that this event did not constitute a parade. We believe that this was error. It is a matter of fact whether or not the procession was treated like a parade and required similar traffic control measures. This dispute of fact cannot be resolved on a summary judgment motion.

The third event is the family farm protest movement march of March 20, 1985 that was originally scheduled as a sidewalk procession with an accompanying flat bed truck proceeding to the state capitol. The protesters spilled into the street and marched on the capitol building. The city first characterized this event as "a spontaneous march." It was not until the city's response to plaintiffs' cross motion for summary judgment filed August 20, 1987 that it first argued that the farm protest "constituted an illegal parade for which participants should be cited." Plaintiffs allege that the family farm protest movement was not cited for its failure to obtain a parade permit. If true, the fact that the family farm protest movement was not cited for its failure to obtain a parade permit and that "spontaneous marches" are allowed provides some evidence that the ordinance is discriminatorily applied.

Because of the factual disputes concerning these incidents as examples, we believe it was error for the district court to grant defendants' motion for summary judgment on the issue of discriminatory enforcement. A grant of summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P., Rule 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (disputes over facts which might affect the outcome of the suit under governing law preclude the entry of summary judgment). We believe these three examples indicate that disputed factual issues remain about whether the ordinance is being discriminatorily applied and the case should be remanded to the district court for a hearing regarding *all* of the allegations of unconstitutional enforcement.

VII.

To conclude, the decision of the district court that Columbus Municipal Code §2111 is consitutional on its face is hereby AFFIRMED. The decision of the district

court to grant defendants' motion for summary judgment on the issue of constitutional enforcement is hereby REVERSED and the case is remanded to the district court for proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

STONEWALL UNION, et al.,

Plaintiffs,

v. Case No. C-2-85-0849

CITY OF COLUMBUS, et al.,

Defendants.

OPINION AND ORDER

This matter comes before the Court to consider the motion of the defendants, City of Columbus ("Columbus"); Alphonso C. Montgomery, Director of Public Safety; and Dwight Joseph, Chief of the Division of Police, for summary judgment, and the cross-motion of the plaintiffs, Stonewall Union and Craig Covey, for summary judgment.

STATEMENT OF FACTS

The Stonewall Union is a non-profit civil rights organization formed in Columbus, Ohio for the purpose of advocating and supporting the civil liberties of gay and lesbian persons. One of the ways in which it carries its message to the general public is by holding an annual gay rights parade on the fourth Sunday afternoon of June in downtown Columbus. The parade, which lasts approximately one hour, has been an annual event since June 1982 and is held in conjunction with simultaneous parades by gay right organizations in other large cities throughout the United States.

The instant case arose from Stonewall Union's 1985 parade. In March 1985, Craig Covey, executive director of the Stonewall Union, sought a permit on behalf of the Stonewall Union which would authorize it to hold a parade in June 1985. Covey also sought two additional permits for related activities. One would allow the Stonewall Union to assemble its parade in Goodale Park. The other would authorize an assembly on the Ohio Statehouse grounds at the end of the parade where speeches would be made.

Stonewall Union obtained permits to hold its assemblies from the city's park department and State of Ohio free of charge. The City of Columbus License Section, however, refused to accept an $85.00 check from Mr. Covey to pay for the parade permit until the Stonewall Union presented it with a receipt showing prepayment for police services. The license section imposes this fee pursuant to the provisions of chapter 2111 of the Columbus Municipal Code which assesses user fees on persons or groups conducting parades on city streets. Columbus, Ohio, Ordinance art. III, ch. 2111 (1984) ["Ordinance"].[1]

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1. The ordinance provides:

§ 2111.01 Definition.

For purposes of the chapter, "parade" shall mean any procession or moving assemblage upon any street or public thoroughfare other than routine vehicular traffic or a funeral procession. (Ord. 1264-84.)

§ 2111.02 Permit required.

(a) No person or organization shall engage in, participate in, aid, form, or conduct any street parade, without first obtaining a permit from the Director of Public Safety.

(continued...)

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1. (...continued)

(b) Exception. This section shall not apply to, nor shall a permit be required in the following instances except as specifically indicated:

(1) Funeral processions;

(2) Picketing conduct off the street or roadway. (Ord. 1264-84)

§ 2111.03 Application for permit.

Any person or organization seeking a parade permit shall file an application with the License Section, Department of Public Safety, upon a form provided by the License Section.

(a) Filing period.

The application for a parade permit shall be filed not more than one hundred and eighty (180) days and not less than five (5) days before the time intended for such parade. For good cause shown, applications may be accepted after the five (5) day limit. Good cause shall be shown when the application can be processed in compliance with the provisions of this Chapter in sufficient time to allow the parade to proceed as scheduled.

(b) Contents.

The application shall at least include the following:

(1) The name and address of the organization sponsoring the parade;

(2) The name and address of the person in charge of the parade;

(3) The date when the parade is to be conducted;

(4) The name of the parade;

(5) The time the parade will begin to form, and the time the parade will begin movement;

(6) The place where the parade will form;

(7) The route of the parade;

(8) The approximate number of participants not including spectators who will participate in the parade;

(9) The number of autos, floats, or bands in the parade;

(10) The place where the parade will disband;

(11) Prior parade history of the organization involved;

(12) Any other information required by the Director of Public Safety to perform the duties described herein.

(continued...)

The Columbus ordinance requires that, as a prerequisite to conducting a parade upon city streets, the organizer first obtain a permit and prepay a fee representing the cost for processing the permit application and the predetermined cost for the maintenance of traffic control along the parade route. The entire process begins when an applicant submits a parade permit application and tenders a filing fee of eighty-five dollars to the city's license section. Upon receipt and processing by the license section, the application is forwarded to the Columbus Police Traffic Bureau for a determination as to the number of police officers necessary to control traffic along the designated parade route. The applicant is then required to prepay the cost for traffic control before the permit is issued. In the instant case, the total amount due was $757.50, representing $85 for the parade permit fee and $672.50[2] for the necessary traffic control services.

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1. (...continued)

(c) Fee.

A fee of eighty-five dollars ($485.00) to cover the expenses incident to processing the application for parade permit shall be paid to the City of Columbus when filing an application for a parade permit. (Ord. 1264-84.)

. . .

§ 2111.99 Penalty.

Whoever violates section 2111.02 is guilty of conducting a parade without a permit, a misdemeanor of the fourth degree. (Ord. 1264-84.)

2. The exact amount to be prepaid by Stonewall Union is in dispute. Plaintiff Craig Covey claims that the Columbus Police Traffic Bureau informed him that twenty officers, two sergeants, one lieutenant, and five police vehicles would be assigned for traffic control purposes at a cost of $1,090.70. Columbus contends the original sum was $672.50, with the increase in cost resulting from the addition of five extra officers pursuant to Covey's request. This dispute does not, however, preclude the Court from resolving the (continued...)

The plaintiffs contend this fee requirement runs afoul of the first amendment as applied to the states by the fourteenth amendment.

PROCEDURAL HISTORY

The plaintiffs filed the instant complaint on May 16, 1985. On May 30, 1985, the plaintiffs filed a motion seeking a preliminary injunction to compel the City of Columbus to issue a parade permit to Stonewall Union without requiring payment of a permit application fee in the amount of $85.00 and costs for traffic control incident to the parade. In response to the plaintiffs' motion for a preliminary injunction, the defendants filed a memorandum contra and a motion for summary judgment. On June 20, 1985, Judge Holschuh denied the plaintiffs' application for a preliminary injunction and on June 25 denied a request by the plaintiffs for an injunction pending an appeal. The Court of Appeals for the Sixth Circuit thereafter affirmed the district court's judgment on May 24. Justice O'Connor of the United States Supreme Court denied the plaintiffs' application for a stay on June 17, 1986. On July 14, 1986, the court of appeals denied the plaintiffs' petition for rehearing. Finally, the plaintiffs filed a cross-motion for summary judgement. This case has since been transferred from the docket of Judge Holschuh to this Court.

At the outset, the Court must determine to what degree, if any, the findings of fact and conclusions of law in Judge Holschuh's Opinion and Order denying the

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2. (...continued)
instant motion for the exact amount charged is immaterial. The essence of the plaintiffs' claim is that so-called "user fees" imposed for exercising constitutional rights are unconstitutional. Thus, so long as the fee exceeds a nominal amount, the issue before the Court remains the same.

plaintiffs' motion for a preliminary injunction govern this Court's consideration of the issues now pending before the Court. In denying the plaintiffs' motion, Judge Holschuh concluded that Columbus could constitutionally impose a license fee "so long as the fee is designed to meet (1) actual expenses incident to the administration of the law, and (2) the cost of maintaining public order for the parade." *Stonewall Union v. City of Columbus*, No. 85-0849, slip op. at 9 (S.D. Ohio June 1985) (order denying preliminary injunction). Having found that the Columbus ordinance satisfied both prongs of this test, Judge Holschuh also found that the parade ordinance served as an appropriate means of regulating the time, place, and manner of parades conducted on city streets. *Id.* at 10-11. Finally, Judge Holschuh also concluded that the ordinance had been applied in an objective and non-discriminatory manner and, thus given the absence of evidence of discriminatory treatment, the issuance of a preliminary injunction was unwarranted at that time. *Id.* at 12.

Generally, it is well understood that under the doctrine of the "law of the case" a court's disposition of an issue of law or fact at one stage of a case becomes binding precedent in successive stages of the same litigation. 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404[1], at 117 (2d ed. 1989). A district court's decision denying a motion for preliminary injunction, however, does not constitute the law of the case and the parties are free to litigate the merits of the case. *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981), *cited in Wilcox v. United States*, 898 F.2d 1111-1114 (6th Cir. 1989) (per curiam); *Bronson v. Board of Educ. of City School Dist.*, 550 F. Supp. 941, 945 (S.D. Ohio 1982); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 798 & n.31

(1981 & Supp. 1989). Parties often prepare motions for preliminary injunctions in haste and thus they are limited in their ability to develop the substantive issues fully. Moreover, the parties normally draft such motions without the benefit of complete discovery. Finally, "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Camenisch*, 451 U.S. at 395. Consequently, in considering a motion for a preliminary injunction, a court's findings are customarily based upon "procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id.* Given the nature of findings made in connection with a preliminary injunction, findings of fact and conclusions of law are neither dispositive of substantive issues, nor binding upon the Court's subsequent consideration of a motion for summary judgment. *Wilcox*, 888 F.2d at 1114. Therefore, this Court must, in essence, conduct a *de novo* review of all questions of fact and law presented by the parties' cross-motions for summary judgment.

In considering the parties' cross-motions, the Court is mindful that summary judgment is appropriate only in limited circumstances. Rule 56(c) of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The moving party bears the burden of establishing the absence of a genuine issue as to any material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). The United States Supreme Court has held,

however, that the standard of summary judgment "mirrors the standard for a directed verdict under Federal Rule of "Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). This is true where, for instance, the dispute turns only on a legal question and the moving party must prevail as a matter of law even if the Court were to resolve all factual disputes in favor of the non-moving party. *Miller v. Consolidated Aluminum Corp.*., 729 F. Supp. 1154, 1155 (S.D. Ohio 1990); *see Ross v. Franzen*, 777 F.2d 1216, 1222 (7th Cir. 1985); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 225, at 79 (2d ed. 1983).

A summary judgment motion also requires special treatment of the record. The Court "must view the evidence presented through the prism of the substantive evidentiary burden" and determine "whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Anderson*, 477 U.S. at 252, 254; *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Nonetheless, in making this determination the Court may not impinge upon the proper function of the jury. Therefore, all of "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 at 255. With this standard in mind, the Court will address the cross-motions for summary judgment.

I.

The plaintiffs attack the parade ordinance as facially unconstitutional on a variety of grounds. First, the plaintiffs question the constitutionality of an ordinance that authorizes a governmental agency to impose fees on

demonstrators or marchers exercising their first amendment rights in a public forum. Second, the plaintiffs argue that even if it is permissible for a governmental entity to assess a "user fee" upon demonstrators to recover expenses for processing and issuing permits and police costs, the ordinance falls short of passing constitutional scrutiny because no exemption is provided for indigent groups. Additionally, it is claimed that the ordinance vests the government with unrestricted discretion in establishing the fees the parade applicant is assessed for traffic control services. Finally, the plaintiffs assert that the fees imposed are not apportioned to the actual cost of processing parade permits and providing traffic control. The Court will entertain each of these arguments in turn.

A. RECOUPMENT FEE CONSTITUTIONAL

Upon an exhaustive and diligent review of the applicable authorities and the arguments proffered by the parties, the Court finds that a municipality may constitutionally require the prepayment of the cost of processing an application for a parade permit and the cost associated with providing necessary traffic control services. In *Cox v. New Hampshire*, 312 U.S. 569 (1940), the Supreme Court upheld a New Hampshire statute that required demonstrators to procure a license permit and prepay a fee prior to conducting a parade or march on public streets. In rejecting claims that the statute interfered with the marchers' first amendment rights, the Court found the permit requirement to be a valid time, place, and manner restriction on individuals' and groups' ability to conduct parades on public streets. The permit requirement, the Court found, served to "conserve the public convenience" by providing public authorities advance notice of the marchers' intentions so

as to allow appropriate arrangements to be made. *Id.* at 576-77.

With respect to the fee requirement, the Court briefly stated:

> There remains the question of license fees which, as the court [state supreme] said, had a permissible range from $300 to a nominal amount. The court construed the Act as requiring "a reasonable fixing of the amount of the fee." "The charge," said the court, "for a circus parade or a celebration procession of length, each drawing crowds of observers, would take into account the greater public expenses of policing the spectacle, compared with the slight expense of a less expansive and attractive parade or procession, to which the charge would be adjusted." The fee was held to be "not a revenue tax, but one to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated. The suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair schedule to meet all circumstances and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.

Id. at 576-77. The plaintiffs urge the Court to reject the language contained in *Cox* as dictum and outdated and unpersuasive in light of modern constitutional law developments. The Court of Appeals for the Sixth Circuit

and Judge Holschuh correctly declined to accept this argument. *See Stonewall Union v. Columbus*, No. 85-3546, slip op. at 3 (6th Cir. May 20, 1986) (affirmed denial of preliminary injunction motion) (court cited *Cox* for authority); *Stonewall Union v. Columbus*, No. 85-0849, slip op. at 9 (S.D. Ohio June 20, 1985) (denying motion for preliminary injunction). In *Cox*, the Supreme Court expressly found that the assessment of a license fee designed to recover expenses incidental to the administration of the licensing procedure and the cost of policing the event did not impermissibly burden the marchers' first amendment rights. Absent authority to the contrary, the principles embodied in *Cox* remain the law of the land.

Subsequent Supreme Court cases do not suggest otherwise. In *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), decided only two years after *Cox*, the Court found unconstitutional a city ordinance which as construed and applied required a religious group to pay a flat license fee as a condition of conducting their distribution activities. In rendering this decision, the Court concluded that the licensing fee was essentially a licensing tax, in that, the fee "is fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues. It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is in no way apportioned." The distinction between *Murdock* and *Cox* and the instant case is readily apparent. Here, as in *Cox*, the municipality seeks merely to recoup expenses incurred in processing and issuing the parade permit and providing traffic control. Admittedly, the fee assessed for the permit is flat, but this figure is directly apportioned to the cost for the processing of the permit application. *See infra* pp. 28-30. The cost assessed for traffic control is a

flexible figure that is dependent upon a variety of factors. *See infra* pp. 19-21, 30-34. It is clear that all fees and cost charged by Columbus are imposed only as a means of recovering expenses and costs. The ordinance is not designed to extract a tax upon those who choose to exercise their first amendment rights. *See, e.g., Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (Court found unconstitutional a state "use tax" on the cost of paper and ink products consumed in the production of periodic publications). So long as the fee imposed is apportioned to actual cost, it does not constitute a tax.

In *United States v. Grace*, 461 U.S. 171 (1983), another case relied upon by the plaintiffs, the issue before the Court was the constitutionality of an ordinance that placed an absolute prohibition on the exercise of first amendment rights in the Supreme Court building or grounds as well as the public sidewalks in front of the Supreme Court building. The plaintiffs argue that the Court's discussion of the nature of streets, sidewalks, and parks and the severe restrictions on the government's ability to permissively regulate express conduct undermines *Cox*.

> "[P]ublic places" historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be "public forums." In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."

Id. at 177 (citations omitted). The *Grace* decision reaffirms the ability of a governmental entity to restrict, at times, expressive conduct by "reasonable time, place, and manner" restrictions. The Court in *Cox* stated over forty years earlier that a governmental entity, in controlling and regulating the use of public streets, may consider time, place, and manner with respect to other proper uses of the streets. *Cox*, 312 U.S. 576. The Court finds that the authority for a municipality to impose a fee for processing a permit fee for an event such as a parade and the cost involved in handling related traffic concerns arises from the municipality's power to enact reasonable time, place, and manner restrictions.

The Columbus ordinance applies reasonable limitations, and the ordinance is content-neutral. The issuance of a parade permit is not contingent upon the promotion or conveyance of a specific message--the content of the message to be conveyed is not considered in issuing parade permits. *See* Ordinance § 2113.03(b). Undeniably, the ordinance is tailored to serve a significant government interest by protecting the marchers from the traffic hazards inherent on a public street. *See Acorn v. Phoenix*, 798 F.2d 1260, 1267-70 (9th Cir. 1986). And, as discussed below, an alternative channel of communication exists for indigent groups. Thus, the parade ordinance constitutes a reasonable time, place, and manner regulation of the city streets.

B. ALTERNATIVE FORUM EXISTS FOR INDIGENT GROUPS

Plaintiffs claim the ordinance is also unconstitutional to the degree it fails to provide any type of exemption for indigent speakers or groups. It is undisputed that the ordinance makes no provision with respect to indigent groups. Indeed, the ordinance contains a non-waiver

proviso which expressly states that the Columbus City Council cannot waive any of the provisions contained in the chapter regulating parade permits. Ordinance § 2111.08.[3] The plaintiffs suggest that payment of the parade permit fee and expenses for police services would create a financial strain for Stonewall Union. The defendants argue in opposition that the plaintiffs have not presented evidence of insolvency and that the reimbursement for costs incurred could be easily recovered from the parade participants.[4] The defendants also contend the city sidewalks provide an alternative forum for the plaintiffs to express their views without payment of a parade permit fee or police cost.

Where a governmental body makes contingent the issuance of a parade permit for conducting a parade on city streets on the payment of a permit fee and cost for traffic control without providing an exemption for indigent group or individuals, the ordinance is unconstitutional absent the existence of an alternative means allowing the indigent groups or individuals to exercise their first amendment rights. *See Lubin v. Panish*, 415 U.S. 709, 718 (1974) (election ballot); *Central Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1523-24 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986) (parade permit fee). The Court finds,

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3. This section provides:

> The provisions contained in this chapter of the code shall not be waiverable by Columbus City Council for any applicant desiring to conduct a parade, procession, or other moving assemblage upon the streets or roadways of the City of Columbus. (Ord. 1264-84.)

4. For purposes of resolving the instant motion, the Court will assume that the plaintiffs are unable to financial satisfy the expenses of obtaining a parade permit fee and the associated police service costs.

however, that Columbus is under no duty to include a fee-waiver provision for indigent individuals and groups given that a constitutionally acceptable alternative forum exist for the dissemination of their messages to the public-at-large.

In the case at bar, an alternative forum is available to the plaintiffs for purposes of conducting their parade: city sidewalks. Individuals and groups are entitled to utilize city sidewalks for purposes of exercising their first amendment rights, via a parade or speech, without procuring a parade permit or advancing monies to the city for police services. The plaintiffs argue, however, that use of the sidewalks will seriously impair their ability to effectively communicate with their audience. While, admittedly, this forum may not serve as the most convenient or practical means for the plaintiffs to present their message, it nonetheless accords indigent groups an alternative forum for voicing their views and ideas. The city sidewalks run adjacent to the street on each side and are also paved, thus providing an acceptable course for executing a parade.

The plaintiffs rely on a number of cases in support of their position, but these cases are factually distinguishable from the case at bar. In fact, each of these cases presented a situation whereby failure to satisfy the fee prerequisites absolutely precluded the prospective participants involvement in the desired activity. Lacking in each case was the availability of an alternative forum or means of engaging in the activity in question. For example, in *Central Florida*, the ordinance in issue provided that no group or person could participate in any "outdoor public assembly" without obtaining a permit and monies necessary to cover expenses. The Orlando, Florida ordinance was all inclusive and incorporated all rallies and demonstrations including parades, whether

conducted on the streets, sidewalks, in the parks, or on public parking lots. Orlando, Fla., Ordinances § 18A.01-.25 (1983); *see* Defendant's Reply to Plaintiff's Memorandum on Issues Presented in Court Order Exh. 1; *see also Lubin*, 415 U.S. at 718 ("in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay"); *Invisible Empire of KKK v. Mayor of Thurmount, Md.*, 700 F. Supp. 281, 286 (D. Md. 1988) (no alternative available to satisfy reimbursement provision). Here, even if financially incapable of satisfying the parade permit fee and police cost, the plaintiffs are not precluded from conducting their parade. The plaintiffs are only limited in their ability to march on city streets in a manner that would disrupt the normal everyday traffic flow, thus warranting traffic control by local law enforcement officials. The plaintiff may still march, chant or sing, displays signs and posters, or even exhibit vehicles or floats incident to the sidewalk procession so long as the vehicles observe all traffic signals.

Moreover, arguably, city sidewalks do not constitute simply an alternative forum, but indeed comprise a parcel of the general forum of "streets and sidewalks." At least under the facts presented, the plaintiffs failure to prepay the parade permit fee and costs for police service would only preclude the execution of their parade from a portion of the public forum of "streets and sidewalks." Under the proposed parade route, the sidewalk runs adjacent on each side of the street for the entire route. By utilizing the city sidewalks, the plaintiffs are able start from their proposed origination point and reach their destination by following the identical route. In essence, the plaintiffs' exclusion is limited to only the center of

the forum. Thus, the plaintiffs' freedom of expression is subject to only a minor restriction.

C. LICENSING ORDINANCE PROVIDES SUFFICIENT STANDARDS FOR ESTABLISHING FEES FOR POLICE SERVICES

The plaintiffs also contend the ordinance is facially unconstitutional since the Director of Public Safety is vested with unrestricted discretion in establishing the fees the parade applicant is assessed for police services. Specifically, the plaintiffs challenge the procedure by which the number of police officers required to supervise the safe execution of the parade is determined by the Director of Public Safety. The plaintiffs argue the ordinance contains inadequate standards, and consequently, the ordinance lends itself to administrative manipulation and potential bias.

It is well recognized that a statute, ordinance, or government practice which grants an administrative body or government official unfettered discretion to regulate the licensing of parade permits is unconstitutional. *Hague v. CIO*, 307 U.S. 496 (1939); *see also FW/PBS, Inc. v. Dallas*, 109 S. Ct. 596, 605 (1990). Such unrestricted discretion increases the likelihood the government official may discriminate based upon the content of the speech or the viewpoint of the speaker. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763-64 (1988); *Cox v. Louisiana*, 379 U.S. 536, 557-58. Therefore, whenever a governmental entity imposes a prior restraint on the exercise of an individual's or organization's freedom of speech, the standards governing must "be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." *City of Lakewood*, 486 U.S. at 770 (citing

Poulos v. New Hampshire, 345 U.S. 395 (1953); *Kunz v. New York*, 340 U.S. 290 (1951)).

The terms of the Columbus ordinance provide for the consideration of the time, date, route, length, and number of participants and vehicles in ascertaining the optimal number of police officers required. Ordinance § 2111.04.[5] These codified factors are applied by utilizing

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5. This section provides:

> In reviewing the application for parade permit, the Director of Public Safety shall determine the number of police officers reasonably necessary to control traffic in the area of the requested parade. In making this determination, the Director of Public Safety shall consider such factors as the time, date, route, length, number of participants and vehicles contained in the application for the parade permit. The Director of Public shall inform the applicant for the parade permit of the number and cost of police officers and vehicles which he determines to be necessary to control the traffic for the requested parade. The cost for each police officer shall be the current standard hourly special duty rate. The cost for each police vehicle shall be the standard hourly rental rate proscribed by the Director of Public Safety. The Applicant for a parade permit shall deposit the amount of money designated by the Director of Public Safety as necessary for police traffic control and police vehicles with the Traffic Bureau of the Columbus Division of Police forty-eight (48) hours prior to the date requested for the parade. (Ord. 1264-84.)

> 2111.05 Standards for issuance of permit.
>
> The Director of Public Safety shall issue a parade permit as provided for hereunder when, from the consideration of the application and from other information as may otherwise be obtained, it appears that:
>
> (a) The conduct of the parade will not substantially interrupt the safe and orderly movement of pedestrian or vehicular traffic in or contiguous to the other route or location of the parade.

(continued...)

a standard criterion involving 11 different considerations:

(1) The proposed route and the designated route for the parade.

(2) The time of day that the event is to take place.

(3) The date and day of the week proposed.

(4) The general traffic conditions in the area requested, both vehicular and pedestrian. Special attention is given to the rerouting

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5. (...continued)

(b) The concentration of persons, animals and/or vehicles at the parade will not interfere unduly with proper fire and police protection of or ambulance service to areas contiguous to the assembly area or other areas of the City.

(c) The conduct of the parade will not result in noise at a level inappropriate to the area surrounding the parade.

(d) The applicant has secured the police officers required under Section 2111.04 of this chapter and has prepaid the expenses therefor.

(e) The parade is not to be held for the primary purpose of advertising any product, goods, or event which is primarily for private profit and the parade itself is not primarily for profit provided, however, the prohibition against advertising any product, good, or event shall not apply to signs identifying organizations or sponsors furnishing or sponsoring exhibits or structures used in the conduct of the parade.

(f) Such parade will not interfere with previously scheduled activities or with scheduled maintenance or repair work to be carried out on the streets or thoroughfares to be used. (Ord. 1264-84.)

of the vehicles or pedestrians normally using the requested area.

(5) The number of market and unmarked intersections along the route requested, together with the traffic control devices present.

(6) If traffic must be completely rerouted from the area, then the number of marked and unmarked intersections and the traffic control devices are taken into consideration.

(7) The estimated number of participants.

(8) The estimated number of viewers.

(9) The nature, composition, format and configuration of the parade or run.

(10) The anticipated weather conditions.

(11) The estimated time for the parade, run or event.

Barth Aff. at 2. The variables considered are not necessarily limited to those enumerated in the Columbus ordinance or provided by the police department. The police officer charged with the responsibility of determining the amount of police support required to safely execute a proposed parade commented, "I still always have in the back of my mind that there could be a variable of some type." Barth Dep. at 29 (Feb. 25, 1987).

Notwithstanding the plaintiffs' claim, the Court is hard pressed to construe this ordinance as vesting unfettered discretion in the Director of Public Safety. This ordinance could hardly be characterized as vague and ambiguous. The six factors for consideration are expressly enumerated in the ordinance, and they are

applied by evaluating 11 different variables. Further, simply because there may still remain an unknown variable or a slight degree of subjective evaluation on the part of the officer in charge does not render this ordinance unconstitutional. Due deference should be accorded to the experience and background of the police officer responsible for determining the necessary number of officers and vehicles required. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 27 (1967). Indeed, requiring the city to enumerate every factor considered in arriving at cost figure would create the nearly impossible task of predicting and evaluating all possible contingencies that may affect the city's calculations. Under the Columbus ordinance the fee amount is arrived at by consideration of a variety of objective factors. These factors coupled with a slight degree of subjectiveness promote a degree of flexibility. Such discretion, in fact, actually improves rather than impairs the plaintiffs' first amendment rights. *Cox*, 312 U.S. at 557. It is clear the Columbus City Council made every attempt to provide objective and definitive standards to guide the licensing authority. The Court finds that the city successfully achieved this goal.

It is equally clear the objective of the ordinance is limited to regulating time, place, and manner concerns. *Cox*, 312 U.S. at 575. The ordinance does not authorize or require the Safety Director to inquire as to the content of the message the applicant wishes to convey to onlookers. Nor is Columbus concerned with the content of pamphlets, if any, distributed along the parade's route. Further, any cost incurred in providing police protection, beyond traffic control, is sustained by Columbus. Barth Dep. at 18 (Apr. 28, 1987). The plaintiffs are not required to paying a fee for additional police protection to control any hostile counter activity. *But see Central Fla.*, 774 F.2d at 1525. Problems associated with crowd

control are handled by the police department as part of its legislative responsibilities. Barth Dep. at 21-22 (Apr. 28, 1987) (stipulation by Columbus); *see also* Joint Appendix 236, 238-39 (testimony of Chief of Police Dwight Joseph at hearing on motion for preliminary injunction). Although, as with any organization, the plaintiff's are free to hire extra duty police officers. Barth Dep. at 19 (Apr. 28, 1987).

Additionally, the Columbus ordinance provides definite limitations on the time in which the licensor must issue or notify the applicant of its rejection. Ordinance § 2111.06.[6] The short-time period of seventy-two hours for the Director of Public Safety to respond guarantees a prompt response to each applicant and thereby reduces the licensor's ability to indefinitely suppress permissible speech. Further, the ordinance contains an appeal procedure designed to enable the applicant to seek relief in the event the application is denied from the Board of License Appeals before the date the proposed parade was originally scheduled. *Id.* § 2111.07.[7]

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6. This section provides:

> The Director of Public Safety shall act upon the application for a permit within seventy-two (72) hours after the filing thereof. If for any reason a longer period of time is required, the reason for such a delay shall be provided in writing to the applicant. If the Director of Public Safety disapproves the application, he shall make a reasonable effort to notify the applicant, either by personal delivery or certified mail, a copy of the notice of rejection and the reason therefor shall be available in the office of the License Section, within twenty-four (24) hours of his actions. (Ord. 1264-84.)

7. This section provides:

> Any applicant shall have the right to appeal the denial of a permit to the Board of License Appeals. All (continued...)

More importantly, there is no evidence before this Court suggesting this ordinance was enacted for purposes of deterring the exercise of the plaintiffs or any other organization's first amendment rights. All groups, regardless of their respective political affiliations or personal beliefs, are entitled to freely conduct a parade on the streets of Columbus upon the timely procurement of a parade permit from the Safety Director. Columbus seeks merely to recover cost incurred in processing the parade permit application and providing necessary safety forces. Moreover, the Court notes the plaintiffs do not contend they were ever denied a parade permit upon payment of the prerequisite permit fee. The Court is satisfied the standards provided for in section 2111.04 fulfill the constitutional mandate that a statute or ordinance subjecting the exercise of first amendment rights to the prior restraint of a license contain narrow, objective, and definite standards to guide the licensing authority. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969).

D. FEES IMPOSED ARE APPROPRIATELY APPORTIONED TO COST

The plaintiffs also contend that the charges imposed by Columbus for street parade activities are not

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7. (...continued)
appeals shall be made pursuant to the provisions of Chapter 505 of the City Codes. The Board shall consider the appeal in accordance with the provisions of Chapter 505 of the City Codes unless a delay will preclude the applicant from conducting its parade. If such a delay occurs, then the Board shall conduct a hearing in sufficient time to allow the applicant to conduct the parade if the appeal is granted. The Board shall direct the Director of Public Safety forthwith to issue a permit, unless using the standards contained in section 2111.05, good cause shall be made to appear for the denial. (Ord. 1264-84.)

apportioned to actual expenses. The plaintiffs argue that the fees and cost charged under the Columbus ordinance cannot withstand constitutional scrutiny unless they are limited to actual cost and the aggregate total does not exceed a nominal amount. In opposition, the defendants claim the standard is one of a reasonable basis rather than actual cost.

The Court's consideration of this issue requires it to first look to the principles embodied in *Cox v. New Hampshire*, 312 U.S. 569 (1941). There, again, the Court upheld the constitutionality of a licensing fee which "had a permissible ranged from $300 to a nominal amount." *Id.* at 576. In reaching this decision, the Court noted that the state supreme court found the fee to be "not a revenue tax, but one to meet the expenses incident to the administration of the Act and to the maintenance of public order in the matter licensed." *Id.* at 577 (quoting *Cox v. New Hampshire*, 91 N.H. 137, 16 A.2d 508 (1940)). This purpose, the Court reasoned, did not run contrary to the Constitution. *Id.* The Court's language in *Cox* hardly suggests that governmental entities are limited to only imposing a nominal amount for permits fees and cost for safety forces. *See Central Fla. Nuclear Freeze Campaign*, 774 F.2d at 1527 (Henderson, J., dissenting). Further, contrary to the view held by the Court of Appeals for the Eleventh Circuit in *Central Florida* and the plaintiffs, the Supreme Court's decision in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), does not detract from the *Cox* opinion permitting the imposition of a fee that may exceed a nominal amount.

> *Murdock* invalidated a flat license fee levied on distributors of religious literature. Distinguishing *Cox*, the Court stated that is was not confronted with

> state regulation of the streets to protect and ensure the safety, comfort, or convenience of the public. Furthermore, the present ordinance is not narrowly drawn to safeguard the people of the community in their homes against the evils of solicitation. As we have said, it is not merely a registration ordinance calling for an identification of the solicitors so as to give the authorities some basis for investigation strangers coming into the community. And the *fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home* against the abuses of solicitators.
>
> The majority's reliance on the *Murdock* Court's use of the word "nominal" misapprehends the basis of the decision--that the flat license tax was not justified by any legitimate state interest. If anything, *Murdock* reaffirms the principle that concerns for public safety support restrictions on speech.

Central Fla. Nuclear Freeze Campaign, 774 F.2d at 1527 (emphasis in original) (citations omitted) (Henderson, J., dissenting). Thus, initially, the Court reject's the plaintiffs claim that a licensing fee or payment of prospective cost requirement is necessarily unconstitutional merely because the sum exceeds a nominal amount.

The Court's inquiry now focuses as to whether Columbus may only require the prepayment of actual cost

for processing the permit fee and safety forces or whether Columbus may constitutionally assess all cost so long as there is a reasonable basis to support their imposition. In considering this issue, the Court remains cognizant that the licensing act upheld in *Cox* was construed by the New Hampshire Supreme Court as requiring "a *reasonable* fixing of the amount of the fee." *Cox*, 312 U.S. at 576 (emphasis added). *See United States Labor Party v. Codd*, 527 F.2d 118, 119 (2d Cir. 1975) (fee imposed represented less than the actual cost of the service provided and subsequently found to be reasonable); *Eastern Conn. Citizens Action Group v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983) ("Licensing fees used to defray administrative expenses are permissible, but only to the extent necessary for the purpose."); *Fernandez v. Limmer*, 663 F.2d 619, 633 (5th Cir. 1981) ("A licensing fee to be used in defraying administrative cost is permissible, *Cox v. New Hampshire, supra*, but only to the extent that the fees are necessary."), *cert. denied*, 458 U.S. 1124 (1982); *Baldwin v. Redwood City*, 540 F.2d 1360, 1372 ("In some circumstances a city may both require a permit for activity involving free expression without violating the First Amendment and also collect fees that fairly reflect costs incurred by the city in connection with such activity."), *cert. denied*, 431 U.S. 913 (1977). To withstand constitutional scrutiny, charges imposed by Columbus for street parade activities must not exceed the actual expenses or cost to the city. In determining, however, the propriety of the charges, it suffices that the fees and costs fairly or reasonably reflect the actual cost.[8]

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8. The United States Supreme Court considered the constitutionality of a user fee under the just compensation clause of the fifth amendment in *United States v. Sperry Corp.*, 110 S. Ct. 387 (continued...)

The Court will first consider the constitutionality of the eight-five dollar permit fee. Columbus based this fee amount on a study conducted by David M. Griffith and Associates, a private firm specializing in developing programs by which governmental units can recover the costs of providing services by assessing citizens a fee for using these services. Brown Dep. at 6-8. Columbus

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8. (...continued)
(1989). This case involved section 502 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, note following 50 U.S.C. § 1701 (Supp. V 1987), which provides for the deduction and payment into the United States Treasury of a percentage of any award made by the Iran-United States Claims Tribunal in favor of an American claimant before the proceeds are distributed to the claimant. Sperry, a successful claimant, challenged the constitutionality of the deduction under the fifth amendment. The United States argued that the deduction did not constitute a "taking" of property but was merely a reasonable "user fee" designed to reimburse the United States for its cost in connection with the Tribunal. Sperry argued, in opposition, that the section 502 deduction was not a valid user fee because the government had not shown that the amount assessed reflects the cost of the proceedings to the United States, the claimant' use of the Tribunal, or the value of the services rendered.

In rejecting Sperry's argument, the Court concluded that "a reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services." *Id.* at 395. In finding the section 502 charge reasonable and assessed for reimbursement purposes only, the Court commented:

> This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of government services. Nor does the Government need to record invoices and billable hours to justify the cost of its services. All that we have required is that the user fee be a "fair approximation of the cost of benefits supplied."

Id. at 394 (quoting *Massachusetts v. United States*, 435 U.S. 444, 463, n.19 (1978)).

engaged the services of this independent consultant to determine the full cost of providing fee related services. *Id.* at 12. The consultant employed a standard method of government cost accounting to determine the "full cost" of service of issuing parade permits. *Id.* 7, 8. The Court notes that the plaintiff does not object to the accuracy of the accounting report nor the acceptability and principles applied in obtaining the cost figure.

As a result of its analysis, the Griffith Company determined that the "full cost" of processing a parade permit was $92.25.[9] *Id.* at 13. The Griffith Company arrived at this figure by dividing all city expenses into four levels: (1) city-wide costs; (2) all cost at the departmental level relating to the Department of Public Safety; (3) all costs at the bureau (license section) level; and (4) the actual costs to the license section of processing and issuing each particular permit. *Id.* at 17-22. The Griffith Company then determined which costs at all four levels of city administration were allocatable to parade permits. The sum total of all four figures equaled the "full cost" of processing each parade permit. Thus, under this method of analysis, the Griffith Company ascertained the actual cost to Columbus of processing each parade permit, rather than simply reaching a cost figure based on the cost involved in processing the application by the license bureau staff (salary multiplied by time spent handling the application plus supplies). *See generally id.* at 30-34. This figure was to reflect the actual cost to the city with no allowances made for profit or to recover in excess of cost. *Id.* at 9. The Griffith

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9. This figure may be lower than the actual cost of processing the parade permit given that the Griffith Company may have failed to include within the cost figure the cost attributed to the evaluation and analysis by police personnel in determining the necessary number of officers for traffic control along the parade route. *Id.* at 49-53.

Company was not responsible for providing a recommendation as to a fair or reasonable fee--Columbus engaged this company solely for purposes of ascertaining the actual cost of the service. *Id.* at 10. Columbus subsequently reduced the actual cost figure by $7.25 to reach a fee of $85 per permit.

The plaintiffs argue that this figure does not reflect the cost to Columbus of processing the parade permits, in that, the "full cost" methodology employed by the Griffith Company includes overhead cost. The Court is unwilling to hold that the actual cost of processing a parade permit is limited solely to the materials and labor consumed in the process. *See Mobile Sign Inc. v. Brookhaven*, 670 F. Supp. 68, 74 (E.D.N.Y. 1987) (court's calculations included such cost as secretarial and office expenses, travel expenses, and supervisory time of fire marshal as part of cost in evaluating a permit fee). Here, Columbus charges a fee that is less than the actual cost for the city to administer the parade permit ordinance. Moreover, the Court has no basis for questioning the validity of the extensive analysis prepared by the Griffith Company. A competent and independent consultant employed generally accepted accounting methods in reaching the $92.25 cost figure. The Court, therefore, finds that the $85 fee charged by Columbus appropriately reflects the actual cost of processing and issuing parade permits.

The plaintiffs also attack the fee charged for police services. Traffic control in conjunction with parades is provided by special duty police officers. A special duty police officer is essentially an off-duty officer hired by private groups or businesses to perform a police-related function. *See* Joint App. 226 (testimony of Chief of Police at hearing for preliminary injunction). In the context of this case, special duty officers are assigned for

traffic control purposes. Cost for such services is computed on a hourly rate based on a special duty wage rate established by collective bargaining.

The plaintiffs contend the actual cost of providing police-related services would be less if the city utilized on-duty police officers or even officers paid overtime. The hourly rate for a special duty officer is not comparable to the overtime pay that on-duty police officers receive. In 1985, the special duty rates were as follows: Police Officer, $12.25; Police Sergeant, $14.00; Police Lieutenant, $15.75. Toni Collins Aff. at 2. The hourly overtime rates for on-duty police officers was significantly higher during this same period: Police Officer, $20.82, Police Sergeant, $23.58, and Police Lieutenant, $27.82 (lieutenants are not paid overtime by Columbus). *Id.* at 3. If on-duty officers working overtime were responsible for the traffic control during the parade, the actual cost of police services would in fact be higher. Additionally, the Court refuses to accept an argument suggesting Columbus must provide police officers at non-overtime rates. The Columbus Police Department is vested with the responsibility of providing protection for the lives and property of all citizens. Joint Appendix 222. Activities such as the annual parade conducted by Stonewall Union consume additional man hours already allocated to other responsibilities. The only means by which the police department, and the traffic bureau specifically, can satisfy the every day demands extracted by the public as a whole and simultaneously handle special events is by utilizing special duty officers or paying overtime to on-duty officers. As between the two, the best means, and least expensive for the promoters of special events, to accomplish this task is to permit the private promoter to, in effect, employ special duty

officers.[10] Thus, the hourly rates assessed for police services is an accurate reflection of the actual cost.

All charges are imposed for a minimum of three hours of police services even though the event may actually last for less than three hours. The Court points out that these special duty officers are normally required to report to a "roll call" approximately one hour in advance of the scheduled event for a briefing and to receive their specific assignments. Barth Dep. at 51 (2/25/87). And, obviously, each special duty officer expends some time in removing any barricades erected for the marchers' safety or in resetting traffic control devices modified for purposes of regulating traffic during the course of the parade. Consequently, the amount of time spent by special duty officers as it relates to a special event is not necessarily limited to the actual time

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10. The plaintiffs contend that the use of Stonewall Union security personnel for traffic control would reduce the cost for police services. According to the plaintiffs, Sue Iarussi, a Stonewall Union member, who is employed as a full-time security specialist with Burns International and employed part-time by the Dublin, Ohio Police Department, is qualified and prepared to supervise Stonewall Union security personnel in directing traffic in the area of the parade in lieu of using Columbus special duty officers. *See* Joint Appendix 205. As a practical matter, this security team is not an adequate substitute for Columbus Police Officers. First, only one member of the Stonewall Union security team has some type of formal traffic control training. Second, even the one member of this team that is qualified to direct traffic is unauthorized to direct traffic in the City of Columbus; thus, Iarussi could not stop a vehicle from entering the parade route or arrest or detain anyone ignoring the team's traffic directions. *Id.* at 210-11. Third, there is an inherent risk to the demonstrators and the general public in allowing unqualified personnel to handle the traffic control responsibilities. Obviously, then, any number of adverse consequences could result from the security team's potentially ineffective traffic control, which could include liability on the part of Columbus and Stonewall Union for vesting inexperienced personnel with the task of maintaining traffic control.

it takes for the event to occur. This minimum three-hour period is simply an attempt by Columbus to make a reasonable determination as to the actual time normally expended by special duty officers in providing traffic control. Indeed, requiring each officer to submit detailed time reports to an administrative officer for later computation may actually increase the charged fee amount once the aggregate sum of the time spent preparing reports by the officers and the administrative review and processing is considered.

Finally, the plaintiffs challenge the hourly rental rate charged for each police vehicle used in conjunction with the parade. The vehicle rental rate is based on commercial car leasing company rates for medium-sized cars. The minimum rental period is two hours without regard to the length of time the parade may last. Again, as with the minimum time requirements for special duty officers, the plaintiffs focus solely on the time parameters of the parade. The real question is what amount of time were the vehicles in service exclusively, within reason, for purposes of the parade. Although undiscussed by both parties, it is certainly likely that the officer in charge assigns each vehicle to a designated location prior to the start of every parade. Moreover, city regulations may require the assigned drive to perform some type of preventive maintenance before operating the vehicle. Certainly, the assigned drive is required to pick-up and return the vehicle before and after the parade. Thus, in determining the actual time each vehicle is in use for a special events, Columbus can consider all time in which the vehicle is in possession of the designated driver for purposes of discharging his assignment as it relates to the special event. Thus, it does not seem unreasonable to find that a minimum rental period of two hours is required to cover this time period.

With respect to commercial rental charges, there is no evidence before the Court suggesting this rental amount exceeds the actual cost. Given the cost of insurance, fuel, and regular maintenance, the Court cannot find the rental figure to be excessive or designed to constitute a profit.

The Court, therefore, finds the cost and fees Columbus requires each applicant to pay before the issuance of each parade permit reasonably or fairly reflects the actual cost of processing and issuing parade permits and providing traffic control.

The Court finds, therefore that a municipality is entitled to assess a "user fee" for purposes of recovering expenses incurred in processing and issuing permits for events such as parades and the costs associated with policing such events. Further, the Columbus ordinance provides adequate standards to allow official to objectively determine the cost of providing traffic control for parades on city streets. The Court also finds that an exemption for indigent group is unnecessary in this cases given the existence of an alternative forum. Finally, the fees and costs imposed under the Columbus ordinance are apportioned to the actual costs of processing and issuing permits and providing police services. Accordingly, the parade ordinance is facially constitutional.

II.

The plaintiffs also claim that chapter 2111 of the Columbus City Code is applied in a discriminatory fashion by city officials. Specifically, the plaintiffs enumerate approximately 16 instances in which the defendants waived or paid the permit fees and associated police costs for groups allegedly favored by city officials. The defendants assert in response that the parade ordinance is consistently applied in an objective and non-

discriminatory manner as to all applicants. In light of the importance of the plaintiffs' challenge, the Court feels it necessary to discuss each claim of differential treatment separately.

The plaintiffs first draw the Court's attention to the defendants' refusal to allow the American Legion to hold a Memorial Day parade comprised of military veterans unless the Legion agreed to pay approximately $2,000 for police services. According to the plaintiffs, Columbus denied a request by the American Legion for a waiver of these cost and as a result the Legion now holds the parade in Hilliard, Ohio. The Court is hard pressed to see how this fact supports the plaintiffs' claim. Surely such a fact lends support to the defendants' contention that the parade ordinance is applied in a non-discriminatory fashion to all groups regardless of their views. The American Legion is hardly perceived as a disfavored organization with little or no support.

On May 8, 1987, the "Take Back the Night" parade was held on city sidewalks. It undisputed that the promoters of the parade did not obtain a permit or provide payment for police services.[11] This fact provides very little support to the plaintiffs' claim of discriminatory treatment, and, if anything, this once again suggests that the city ordinance is uniformly applied to all groups. No parade permit is required under the ordinance when the parade is conducted on city sidewalks--a permit is only needed when the parade takes place on city streets. As for the police services, such assistance is uniformly made available at no cost to the participants of

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11. Six police cars, several officers on foot, and a police van were present for the entire parade.

parades conducted on city sidewalks.[12] This same option was and is available to the plaintiffs in the event they choose to hold their parade on city sidewalks as opposed to city streets. *See supra* pp. 14-18.

The plaintiffs also encourage the Court to characterize several activities which are not considered parades under the language of the city ordinance as essentially being equivalent to their parade for purposes of determining whether Columbus accorded certain groups preferential treatment. The plaintiffs claim that in 1985 the City of Columbus assigned approximately 62 police officers for traffic control services for automobiles using city streets to leave and enter the Ohio State University campus before and after Ohio State football games. The city provided these services, valued at approximately $100,000, free of charge. The plaintiffs also suggest to the Court that such services were provided free of charge in 1986 and 1987. The defendants state that the Ohio State University hires Columbus Police, Deputy Sheriffs, and State Highway Patrol officers to provide traffic control in the immediate area around the Ohio State University Stadium during

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12. In Plaintiffs' Reply in Support of Cross-Motion for Summary Judgment, the plaintiffs direct the Court's attention to another parade which received substantial police supervision. According to the plaintiffs, promoters conducted a sidewalk parade protesting the victimization of women at night on city streets without procuring a parade permit. During the course of this parade, the city, at least indirectly, provided substantial, but unrequested, police supervision. Once again such information, provides no evidence of discriminatory treatment. Here, as with the "Take Back the Night" parade, pursuant to the Columbus ordinance, no permit was required for a *sidewalk* parade.

The Court notes that the city's policy of providing police services free of charge for sidewalk parades but not for street parades is a matter of legislative discretion.

home Ohio State football games. It is admitted, however, that Columbus does assign some regular patrol officers, approximate two dozen, to handle traffic in areas outside the University.

The Court notes that although there is a dispute as to the number of police officer assigned to the University for traffic control before and after Ohio State football games and whether or not Columbus charged the University for such services, this does not create an genuine issue of material fact. Even if the city provided approximately 62 police officers for traffic control services as alleged by the plaintiffs, this situation is easily distinguished from that in the case at bar. First, the traffic resulting from Ohio State football fans entering and exiting the University area is simply not a parade as the term is defined under the city ordinance. Moreover, an individual's general understanding of the term "parade' would hardly encompass such traffic activity. Second, Columbus is simply exercising sound judgment in dispatching adequate police support in areas that past experience indicates is heavily congested prior and subsequent to home football games. Surely the plaintiffs cannot deny that a vital function of the city's traffic bureau is to provide for the orderly ingress and egress of automobile traffic from the University area or any other area in which heavy traffic may increase the likelihood of accidents and fuel the tempers of impatient drivers.

In further support of their claim of discrimination, the plaintiffs notes that the City of Columbus routinely furnishes on-duty police officers and police vehicles to take part in funeral processions for active duty and retired police officers. These officers are authorized to assist in traffic control related to the funeral and may do so if necessary. The defendants assert that traffic control responsibilities for funerals of police personnel are

handled by a paid deputy sheriff. Columbus police officers in attendance as honor guards occasionally assist the deputy sheriff when there appears to be a temporary traffic congestion problem, and admittedly, no charges are imposed for police participation or traffic control activities in conjunction with the funeral procession. This Court finds this clearly to be evidence of differential treatment, but since a funeral procession and parade are treated differently under the city ordinance, no constitutional problems arise. A funeral procession is simply not a parade. For the plaintiffs to successfully present their claim they must demonstrate that the city ordinance is discriminatorily applied. Initially, however, the plaintiffs must present the Court with at least two similar cases for purposes of comparison. The plaintiffs' evidence of differential treatment between dissimilar events provides no support for their claims.[13]

On March 20, 1985, a number of motor vehicles en route from Cincinnati to the Ohio Statehouse to protest the closing of all Ohio savings and loan institutions in Columbus proceeded on city streets without obtaining a parade permit or prepaying costs for police services. Once again the crucial question is whether this activity constituted a parade as this term is defined under the city ordinance. According to the defendants, two separate motorcades made up of a large number of automobiles, vans and other motor vehicles travelled from Cincinnati and Dayton and then merged in Columbus. The drivers eventually parked their vehicles at the Ohio Center on North High Street and then walked on the sidewalks to the State Capitol for a demonstration. During the course of their travel, the vehicles involved flowed with other

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13. Moreover, funeral processions are expressly excluded from the definition of "parade" under chapter 2111. Ordinance § 2111.01.

traffic currently on the streets and obeyed the established traffic control devices. The Court finds as a matter of law that the motorcades' travel did not constitute a parade, perhaps a convoy, but not a "parade" as the term is defined under the city ordinance. As such, the participants were not required to obtain a permit. While the city police did monitor the flow of traffic, the city police did not provide any additional protection that extended beyond their normal obligations for maintaining traffic control. Thus, since this activity did not constitute a "parade," it cannot be used for purposes of comparison.

Finally, the plaintiffs attempt to characterize the motorcades of Walter Mondale, Geraldine Ferraro, and George Bush as parades. Certainly the need for additional protection and precautionary measures with respect to visiting presidential and vice-presidential candidates is recognized by the plaintiffs. Columbus Police Officers serve a vital role in ensuring the safe and speedy transportation of such individuals. Again, evidence of preferential treatment is irrelevant given the non-parade status of the motorcades.

Events or activities constituting a parade as the term is defined under chapter 2111 is limited to processions or moving assemblages upon public streets or thoroughfare other than routine vehicular traffic or a funeral procession. Ordinances § 2111.01. The established practice is apparently to treat a motorcade or convoy of vehicles as "routine vehicular traffic" when the participating vehicles observe all traffic signals and speed limits. The plaintiffs attempt to construe the aforementioned events as parades is unpersuasive. The Court can only accept the plaintiffs' argument by manipulating and distorting the definition of "parade" as it is defined under the ordinance. The Court rejects this approach. Thus, absent a common basis for comparison,

there is no evidence of constitutionally impermissible discriminatory treatment.

The plaintiffs now draw the Court's attention to several city agencies' payment, direct and indirect, of fees and police cost for various parades and events. The Columbus Recreation and Parks Department appropriated the funds necessary to finance a parade honoring olympic gold medal winner Jerry Paige. The plaintiffs' contest the fact that a city department provided the necessary financial backing for this parade. The Court agrees with defendants that this city agency apparently made a proper expenditure from its department's budget.[14] The Court notes that local government entities are vested with the duty to provide for the health and welfare of the constituency they serve. Surely recognizing the athletic achievements of a member of the community serves to create a sense of community pride and promote public morale.

The plaintiffs claim Columbus also financed the 1986 Bank One Marathon. The defendants freely admit that the Recreation and Parks Department in 1984 and 1985 and the Greater Columbus Convention and Visitor's Bureau ("GCVB") in 1986 satisfied all police costs incurred for traffic control expenses related to this event. Here, as in the Jerry Paige parade, the city seeks to encourage the community to engage in a form of physical fitness and attract various athletic events to the central Ohio area. Joint sponsorship of this road race is merely one of many diverse athletic programs promoted by the Columbus Recreation Department year round.

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14. The Court notes it reluctancy to review the propriety of administrative agencies' expenditures. The Court finds it sufficient to state at this juncture that the expenditures made are at least facially appropriate. If plaintiffs are displeased with the manner in which city monies are distributed or used, their objections must be addressed to the local legislature.

Columbus also indirectly financed the Veterans of Foreign Wars annual parade. The fee and police services for this parade were paid by GCVB, which is an organization funded by Columbus City tax revenues collected from the city's Hotel-Motel tax. GCVB is a tax exempt organization designed to publicize and attract visitors to the greater Columbus area. It seeks to acquire national or state organizations to conduct their annual meetings in central Ohio. GCVB sponsored the VFW's parade in an effort to entice the VFW to hold its convention in Columbus. Given that the vital mission of the Columbus Convention and Visitor's Bureau is the promotion of the city for convention purposes, tourism, and major sporting events, its funding of the VFW parade is simply an example of this organization fulfilling its central purpose.

Similarly, the plaintiffs object to the payment by the Department of Human Services of the parade permit fee and police cost associated with a 1985 and 1986 parade held on city streets to urge young people not to use drugs. The Office of Youth Services is involved in counseling "at risk youth." These are young people who are considered to be highly susceptible to drug or alcohol abuse. In order to promote a program opposing the use of drugs by youths, the Office of Youth Services co-sponsored these parades with Comp. Drug. Comp Drug is a private non-profit organization within the Franklin County Mental Health Systems which provides preventive programs as well as treatment for drug abuse. Here, again, the monetary expenditures made by this city agency were in furtherance of its duties and goals.

The Court's attention is also drawn to Columbus' involvement in the financing and operation of the Columbus 500 auto race. This involvement is, again, not evidence of unconstitutional disparate treatment. Cost for

the parade permit and associated police cost is paid by the Chase Bank of Ohio. Wells Aff. at 1-2. The monies to cover expenses is, however, handled in a slightly different manner. Chase Bank sends the monies for expenses to the recreation and Parks Department, which then assists in the coordination and planning of the parade. The plaintiffs proffer no evidence suggesting that Chase Bank does not provide the necessary financial support.

The plaintiffs also question Columbus' involvement in sponsoring a Columbus Day parade. The direct sponsor of this parade is Columbus Day U.S.A., Inc. This is a private corporation formed for purposes of organizing Columbus Day activities, which includes a parade. The Columbus Chamber of Commerce aids in the management of the three-day celebration. Although the majority of funds for this $200,000.00 celebration are provided by private corporations, the Columbus City Council does appropriate by legislation some financial support. Here, again, the city attempts to promote community involvement in an event the entire community can participate. Likewise, the city's promotion of an annual Fourth of July parade hardly indicates preferential treatment.

Finally, plaintiffs point to Columbus' solicitation of funds from a private organization for funds to sponsor a parade honoring Bobby Rahal, a local resident who won the Indianapolis 500 Race in 1986. The plaintiffs suggest this solicitation coupled with the Recreation and Parks Department cooperation in the organizing and execution of the Rahal parade is evidence of the Columbus' practice of discriminatorily granting preferential treatment to favored groups over uncelebrated groups or groups who advocate disfavored views. It is undisputed, however, that the parade permit fee and associated costs were paid by a

private company. Evidence of discriminatory treatment is lacking for two reasons. First, it is an exaggeration of the term to characterize verbal encouragement and planning assistance as financial sponsorship. Second, even if Columbus financed the event through the Parks and Recreation Department, this parade, like the Paige parade and Bank One Marathon, would have been in furtherance of that agency's primary responsibility.

Under the plaintiffs' reasoning, the City of Columbus is under a continuing obligation to assume all the costs associated with processing parade permits and providing traffic control for all groups so long as it continues to finance and participate, directly and indirectly, in any parades. Under this view, Columbus could only maintain and enforce the parade ordinance by not sponsoring parades recognizing local celebrities for their achievements or promoting anti-drug themes. Further, Columbus could not sponsor athletic events that are considered parades under the ordinance, namely running events. The constitution does not mandate such a result. The stance advocated by the plaintiffs would undermine local governments' ability to promote the general health and welfare of the community without simultaneously incurring responsibility for financially sponsoring all parades.

Furthermore, the Court cannot construe many of the parades directly or indirectly sponsored or promoted by the city as executed for purposes of expressing a particular view point. In many of these instances the conduct involved lacked an expressive element. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986) (sexual activity contained no element of protected expression). *But cf. Texas v. Johnson*, 109 S. Ct. 2533, 2540 (1989) (flag burning); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)

(overnight sleeping in connection with demonstration for plight of homeless assumed to be expressive conduct); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (burning of draft card deemed expressive conduct). The essence of a court's inquiry in determining whether action or conduct falls within the concept of expression of speech is, of course, factually oriented. In considering the issue, the court looks to see whether the actor(s) intended "to convey a particularized message." and "the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11 (1974); *see also Texas*, 109 S. Ct. 2539.

With respect to the city's involvement with the Columbus 500 auto race, Bank One Marathon, and parades honoring Bobby Rahal and Jerry Paige, there clearly was no intent to convey any particular message by the participants, nor was it likely that any onlookers perceived these events as conveying a message. *See Craft v. Hodel*, 683 F. Supp. 289, 291 (D. Mass. 1988) (nude bathing); *Heimbaurgh v. San Francisco*, 591 F. Supp. 1573, 1576 (N.D. Cal. 1984) (softball playing did not involve symbolic speech). Here, the absence of an expressive element is a key distinction between these events and the plaintiffs proposed parade.

In regard to the VFW, Fourth of July, and anti-drug parades, however, there is an element of expression underlying each of these parades. The anti-drug parade, of course, was held for the sole purpose of encouraging the community to avoid drug use. Thus, the Office of Youth Services utilizes the parade as but one instrument among many to promote its anti-drug campaign. A substantial percentage of the general population, however, including members of the national media and the federal bench, advocate the decriminalization of drug use. Thus, obviously, given the dispute as to the appropriate manner

to effectively regulate drug use in the United States today, there is an element of expression in any anti-drug parade.

Likewise, the VFW parade serves to promote patriotism and recognize the achievement and sacrifices made by the individuals who served in foreign wars. The recognition aspect is, as with similar parades, non-expressive in nature; the patriotism portion, however, involves the dissemination of a particular belief--the concept of supporting and cherishing your country. The first amendment also extends protection to those who wish to voice their contempt and disrespect for the symbols and actions, such as military aggression, of this country. These two sentiments are necessarily in conflict and thus supports the Court's conclusion that an element of expression is evident in the VFW parade. The same can be said for the Fourth of July parade.

Although expressive in nature, the VFW, Fourth of July, and anti-drug parade are distinguishable, again, because they are the end result of an administrative agency discharging its responsibilities. The Court notes that the plaintiffs are not claiming that Columbus financed and supported causes such as pro-abortion, nuclear disarmament, groups promoting the environment, white supremacy groups, or any other causes generally viewed as political in nature. There is no evidence suggesting that Columbus, through its agencies, by means of financial assistance sought to promote only those organizations it deemed deserving of preferential treatment or those it which government officials found to be sympathetic. In each instance in which a city agency directly or indirectly supported a parade, it is clear that the promotion was intricately related to the successful realization of the agency's legislative purpose.

Finally, the plaintiffs assert that charges for police services were waived and no permit fee was charged for a parade conducted in support of the family farm movement on March 20, 1989. This assertion is not disputed by the defendants. It is defendant's position, however, that the organizers of this parade never submitted an application for such a permit, nor did the police department provide special traffic control services. The defendants' claim this was not a case in which the city waived the permit fee and police costs, but rather a case in which the promoters of the family farm movement conducted an illegal parade. Further, the defendants suggest that since several activities of a similar nature were occurring at the same time, officers were spread too thin to immediately react and issue citations. Whether or not the promoters of this parade actually applied for a parade permit, received police assistance at no cost, or whether the police department's failure to issue citations for an illegal parade suggested the defendants' acquiesced in promoting the parade unquestionably creates genuine issues of fact. The Court, however, still finds this case appropriate for summary judgment inasmuch as these issues does not constitute material facts. If, indeed, Columbus waived the permit requirement and provided police assistance free of charge to these marchers, this, alone, would be insufficient grounds for a reasonable jury to find that the defendants applied the parade ordinance in a discriminatory fashion. Given the overwhelming evidence suggesting no disparate treatment under the ordinance, one minor or inadvertent mistake on the part of the defendants is clearly inadequate grounds for reaching a verdict in favor of the plaintiffs. Certainly, one isolated incident does not suggest a pattern or policy of discrimination.

Upon review of the factual record, the Court finds that reasonable jurors could only conclude that Columbus applies the parade ordinance in a uniform and non-discriminatory manner. The Court declines to infringe upon the province of the local legislature. As such, the Court cannot accept the plaintiffs' construction of the term "parade" for to do so would require interpreting the parade ordinance in a fashion beyond its literal reading. Nor is the Court empowered to address the plaintiffs' concern as to which permits Columbus chooses to assess a "user fees" or as to which activities permits are required. Such issues are, again, within the province of the legislature.

The plaintiffs have sought to lend credence to their claims by arguing that the Columbus City Council enacted the parade ordinance as a means to discourage the exercise of first amendment rights. Whatever may have been the city council's underlying reason or motive for establishing a system for the recover of processing and police cost is of little significance since it is well established that courts are not to strike down as unconstitutional "an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Indeed, under the facts presented, it is mere speculation to suggest that Columbus officials are actively engaging is a practice designed to suppress the plaintiffs' freedom of speech.

CONCLUSION

Absent a constitutional prohibition or controlling authority to the contrary, the Court declines to impose upon local governments the burden of assuming responsibility for cost incurred in processing and issuing parade permits and providing necessary traffic control

services. Although the government is responsible for providing police supervision to protect groups from exercising their first amendment right from hostile counter-demonstrators, it is under no such duty to subsidize the cost involved in expressing a particular view point. While the plaintiffs certainly have the undeniable right to actively promote their cause, the manner in which they exercise their first amendment rights is not absolute. Considerations such as traffic control and safety are always of concern. Budgetary constraints are also a factor. Many municipalities are financially unable to provide the type of services that are absolutely necessary for various organizations to safely execute parades of the size in the case at bar. In an era of strict budgetary constraints, it is not unreasonable to require participants to bear a portion of the expenses involved in processing permits and providing traffic control. Indeed, the general public is not bound to financially support those exercising their first amendment rights.

WHEREUPON, upon consideration and being duly advised, the Court finds defendants' motion for summary judgment to be meritorious, and it is, therefore, **GRANTED**. The plaintiffs cross-motion for summary judgment is, therefore, **DENIED**. Judgment is hereby **ORDERED** for the defendants.

IT IS SO ORDERED.

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UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION

No. 85-3546

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Stonewall Union; Craig Covey, Plaintiffs-Appellants, V. City of Columbus; Alphonso C. Montgomery; Dwight Joseph, Defendants-Appellees.	)	On Appeal From the United States District Court for the Southern District of Ohio

BEFORE: KENNEDY and MILBURN, Circuit Judges; and JOINER, Senior District Judge*.

PER CURIAM. Plaintiffs appeal the judgment of the district court denying their request for a preliminary injunction in this action challenging the constitutionality of City of Columbus, Ohio, ordinances. The ordinances provide that as a prerequisite to conducting a parade upon the streets of Columbus, a permit must first be obtained and require prepayment of a fee representing the costs for processing the permit application and the determined costs for the maintenance of traffic control along the parade route.

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* The Honorable Charles W. Joiner, Senior District Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

The district court held that plaintiffs have little likelihood of success on the merits because the Columbus ordinances appear to be valid "time, place, and manner" restrictions under *Cox v. New Hampshire*, 312 U.S. 569, 61 S. Ct. 762 (1941). The district court found the ordinances to be content neutral and narrowly tailored to serve a significant governmental interest, namely, traffic control. The district court further found the charges imposed by the ordinances to be limited to the administrative costs and traffic control costs created by the parade in question. Finally, the court observed that alternate channels of communication were present in that persons may march on the City's sidewalks or in its parks without paying any fees or obtaining any permits. Having found the ordinances facially constitutional, the court also determined that the City had applied the ordinances in a constitutional manner.

On appeal plaintiffs argue that the ordinances unconstitutionally restrict access to public forums and that the charges levied under the ordinances are impermissible user fees whereby the City conserves its treasury from expenditures which accommodate the free flow of ideas on public forums.

The scope of our review of the denial of a preliminary injunction is limited to whether or not the district court abused its discretion. *See Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 753 F.2d 1354, 1356 (6th Cir.), *cert. dismissed*, 105 S. Ct. 1155 (1985). Upon consideration of the entire record, the briefs filed herein, and after oral argument, we hold that the district court did not abuse its discretion in denying plaintiffs' request for a preliminary injunction. There was a basis for the district court's finding that the ordinances in question are content neutral and that alternate channels of communication were in fact present in that the

plaintiffs could have marched on the City of Columbus sidewalks or in its parks without paying any fees or obtaining any parade permits. Finally, based upon *Cox v. New Hampshire, supra*, the plaintiffs have not shown a sufficient likelihood of success on the merits of this case. Accordingly, the judgment of the district court is AFFIRMED in all respects.

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By _____
Deputy Clerk

ISSUED AS MANDATE: July 22, 1986
COSTS: None